

INVOLUNTARY ACTION AND CRIMINAL RESPONSIBILITY

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Abstract

This thesis considers the concept of involuntary action in the criminal law. In particular it examines the defence of automatism. The discussion of the defence by the courts in England and Wales and jurisprudential commentary regarding involuntary action are considered. Present legal definitions of involuntary action do not take account of current scientific or philosophical debates relating to consciousness and the science of the mind. It is argued that modern neuroscientific definitions of consciousness are useful to the criminal law. They suggest how consciousness is used by the brain to assist in the carrying out of tasks and to monitor the interaction between the individual and the world in which her behaviour takes place. They provide evidence that conscious awareness of tasks differs according to the complexity of the task undertaken and the experience of a particular person in performing a particular task. On this view conscious awareness will exist in varying degrees according to the task which is being undertaken and the person performing that task.

It is argued that a purely mechanistic or reductionist evaluation of consciousness will not assist in defining criminal responsibility. The thesis also examines differing types of explanation of action. These include philosophical definitions of action and discussions of how consciousness relates to action. The opinions of courts in five other jurisdictions on certain approaches to the automatism defence are considered. The problems of combining legal and philosophical definitions are discussed. A revised test of involuntariness is suggested.

The research findings contribute to the fund of knowledge in a number of ways. Firstly they review the case law of automatism in England and Wales and certain aspects of the defence of automatism in five other jurisdictions. Secondly the research examines the relevance of modern neuroscientific research and the philosophy of consciousness in relation to the criminal law's approach to involuntary action. Finally the research findings are utilised to propose a new test of involuntariness.

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Introduction

At the root of the discussion concerning involuntary action and the criminal law there is a conflict. The conflict is between two methods of attributing responsibility for actions. There is a societal reaction to crime which finds expression through punishment and blaming individuals who have carried out actions which have resulted in harm. There is also, within the legal system a pressure to attribute blame only to those who are proved by the due process of the law to be responsible for their actions. This attribution of legal responsibility may not be simply causal. In such a case the argument might be that a defendant had caused an act, in the sense that it could not have occurred had she not been present, but might nonetheless not be criminally responsible for that action because the act which caused the wrongful conduct was beyond her control. An example of this is where the act takes place whilst the defendant is suffering a hypoglycaemic episode. In *R v Padmore*¹ such a claim was accepted by the prosecution and as a result the court hearing of the case against the defendant, who had killed during a hypoglycaemic episode, did not proceed. The reason given for the prosecution's decision was the acceptance that 'the defendant's condition [diabetes] of which he was unaware and unable to control at the time took over.' Detective Chief Inspector Richard Taber commenting for the police said:

that the victim's family, to whom police had spoken, had accepted that no one was to blame for the killing. 'They do understand the reason why the court has reached the decision it has today. Mr Padmore now has to live with the consequences of his actions. It is a tragedy for him as well as those who knew and loved Mr Trent. I believe that justice has been served in this case'.²

The irony is that if Padmore had been suffering from hyperglycaemia, an alternative form of diabetic episode, the case might have resulted in a verdict of insane automatism - with very different consequences for the defendant. If the aetiology of his disease had been different, that is its cause internal rather than external, he might have been found not guilty by reason of insanity. The effect of such a verdict, because the charge was one of murder, would have

¹ Unreported

² Both quotations The Times 17th December 1999 p.3

meant that the court would have had no discretion in sentencing. The court would have had to make a hospital order which restricts a defendant's discharge without time limitation.³

Smith, when considering criminal liability, states '[w]hat is clear is that the voluntariness of an act is a more fundamental element of criminal liability than the intention to cause, or foresight of, results of the act which we normally think of as mens rea. It is a defence, known as automatism, that this element has not been proved by the Crown.'⁴ Smith also highlights other forms of involuntary behaviour, such as brake failure, resulting in the loss of control of a vehicle and concludes: 'that D should never be held criminally liable for an "act" or result of an act over which he has no control.'⁵ The discussion in this thesis centres on the paradigm case of involuntariness in the criminal law, automatism.

In framing attributions of criminal liability the courts have examined the meanings of the words 'voluntary' and 'act' and given them specialist meanings. It is argued in this thesis that the present definition of involuntary action is faulty in that it does not provide a satisfactory measure of when conduct is involuntary. Neuroscientific, biological, medical and philosophical definitions of involuntary action will be considered to examine whether they can assist in refining the legal definition of automatism.

Mental and physical elements of criminal liability

Smith discusses the requirements of actus reus and mens rea and how criminal liability is established. Discussing actus reus and mens rea he writes: -

It is a general principle of the criminal law that a person may not be convicted of a crime unless the prosecution have proved beyond reasonable doubt both a) that he has caused a certain event or that responsibility is to be attributed to him for a certain state

3 Criminal Procedure (Insanity) Act 1964 s 5(3) as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 5 and Schedule 1

4 SMITH, J.C. 1999. *Smith and Hogan Criminal Law*. (9th edit.). London: Butterworths. p.38

5 SMITH, J.C. 1999. p.41

of affairs, which is forbidden by the criminal law, and b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs.⁶

Smith then examines the requirements of criminal responsibility as laid down in *Woolmington v DPP*⁷ and concludes that: '[t]he true rule is that the jury must acquit even though they are not satisfied that D's story is true, if they think it might reasonably be true.' The exception to this rule is the defence of insanity. 'To raise other defences at common law - for example, provocation, self-defence, automatism or duress - the accused need do no more than introduce some evidence of all the constituents of the defence; whereupon it is for the Crown to satisfy the jury that at least one of those constituents did not exist.'⁸

Smith discusses the requirement that both *actus reus* and *mens rea* need to be established before criminal liability may be imposed. There is no formal agreement between lawyers regarding whether the voluntary act requirement goes to *mens rea* or *actus reus*.⁹ Indeed the utility of defining elements of criminal liability in this manner is questioned by Clarkson and Keating, who assert a strongly contrary view: '[w]hether defendants are to be convicted should depend upon important principles aimed at deciding whether their conduct deserves condemnation as criminal; such questions should not be answered by reference to definitions such as *actus reus* and *mens rea*. Questions of policy should not be determined by reference to definition and terminology.'¹⁰

6 SMITH, J.C. 1999. p.27

7 [1935] AC 462

8 SMITH, J.C. 1999. All quotations p.27. For a discussion of the burden of proof and the case law relating to automatism see chapter 2

9 Norrie sees the voluntary act as going to *actus reus*., NORRIE, A. 1993. *Crime Reason and History*. London: Weidenfeld & Nicholson. p.111. Smith is undecided but states that the argument that it must go to *actus reus* if it is to excuse liability in cases of strict liability is a fallacious reading of the meaning of strict liability. 'The fallacy in this argument lies in the proposition that offences of strict liability require "no *mens rea*" and the assumption that this means that the whole of the mental element involved in *mens rea* may be lacking. This is not so. If the mental element is part of the *actus reus*, there is certainly no way of dispensing with it; but it does not follow that it must be dispensed with where an offence is held to be one of strict liability.' SMITH, J.C. 1999. p.37. Emphasis in original. For a discussion of the philosophical problems associated with dividing descriptions of action into the mental and physical see chapter 4

10 For a discussion of this and the difficulties caused when courts adhere to strict demarcations between *actus reus* and *mens rea* see CLARKSON, C.M.V. & KEATING, H.M. 1998. *Criminal Law Text and Materials* (4th edit.). London: Sweet & Maxwell. p.91

Lord Simon in *DPP for Northern Ireland v Lynch* described the interconnection of actus reus and mens rea as follows:

Lastly, actus reus and mens rea are misleading terms; since (other than exceptionally) a mental state is not criminal without the accompanying mental element. Both terms have, however, justified themselves by their usefulness; and I myself shall myself employ them in their traditional senses - namely, actus reus to mean such conduct that constitutes a crime if the mental element involved in the definition of the crime is also present (or more shortly conduct prohibited by law); and mens rea to mean such mental element, over and above volition, as is involved in the definition of the crime.¹¹

It is not clear from this statement where Lord Simon places voluntariness in the criminal equation. He seems to see it as a separate item. Intuitively it seems this must be the case. As will be seen the common law presumes an act is voluntary unless there is evidence to the contrary. The academic argument regarding whether voluntariness goes to actus reus or mens rea is concerned, inter alia, with preventing criminal liability attaching to those who commit strict liability offences whilst in a state of involuntariness.¹²

Legal historians trace the mens rea, actus reus doctrine back to Augustine.¹³ The doctrine entered the criminal law via canon law,¹⁴ which was heavily influenced by the teachings of St. Augustine. Augustine based his philosophy of the mind upon three concepts: memory, reason and will.¹⁵ Additionally he accepted the fundamental Christian doctrine that all men are equal

11 [1975] AC 653, 690

12 SMITH, J.C. 1999. p.37

13 They trace the maxim 'Et actus non facit reum nisi sit mens rea' via Coke's Third Institute vi to the 'Red Book of the Exchequer', which contains *Leges Henrici* v 28 and thence to St. Augustine's Sermons, where it appears as 'reum linguam non facit nisi mens rea.' BAKER, J.H. 1990. *An Introduction to English Legal History*. (3rd edit.). London: Butterworths. p.597. POLLOCK, F. & MAITLAND, F.W. 1989. *The History of English Law*. (2nd edit.). vol. 2. Cambridge University Press. p.476. Though Pollock and Maitland stress St. Augustine used the concept only with reference to perjury

14 BLACKBURN, R. 1995. *The Psychology of Criminal Conduct*. Chichester: John Wiley & Sons. p.254

15 On the Trinity, Book X, chap. xi,

'Since these three, memory, reason, and will, are not three lives but one life, not three minds but one mind, it follows that they are not three substances but one substance ... These three are one, in that they are one life, one mind, one essence. But they are three, in that I remember that I have memory and understanding and will; and I understand that I understand and will and remember; and that I will that I will and remember and understand.'

quoted in HUNT, M. 1993. *The Story of Psychology*. New York: Doubleday. p.50

before God as members of a universal brotherhood.¹⁶ Robinson points out that this created problems in explaining human error. Augustine's solution was to explain human conduct in terms of free will. 'Without free will, evil had to be attributed to divine authorship, which was a notion not only heretical but one utterly incompatible with the concept of sin and personal responsibility.'¹⁷ By the use of the concept, humans were 'elevate[d] ... to the status of morally responsible agents.'¹⁸ Augustine's works not only influenced the development of the criminal law but as Hunt points out 'the principal notions that received the imprimatur of his authority ... became the only acceptable psychology for the next eight centuries.'¹⁹ Implicit in Augustine's teachings is the notion of dualism.

Dualism

Dualism²⁰ is the distinction made between mind and body most famously expressed by Descartes:

I know with certitude that I exist, and because, in the meantime, I do not observe aught necessarily belongs to my nature beyond my being a thinking thing ... on the other hand I possess a distinct idea of body, in so far as it is only an extended and unthinking thing,

16 ROBINSON, D.N. 1986. *An Intellectual History of Psychology*. University of Wisconsin Press. p.127

17 ROBINSON, D.N. 1986. p.127

18 ROBINSON, D.N. 1986. p.127

19 HUNT, M. 1993. p.52

20 Dualism.

'The philosophical Theory that supposes that mind is essentially independent of the brain, though mental events run parallel with physical brain events. This leads to several suggested (usually causal) relations: (i) Mental and brain events run in parallel without causal interaction (epiphenomenalism). (ii) The brain 'secretes' mental events, rather as glands secrete substances. (iii) Brain and behaviour are controlled by an essentially autonomous mind. (iv) The mind is an emergent property of brain processes, rather as the properties of water emerge from the combined atoms of oxygen and hydrogen, which in isolation have very different properties. (v) Mind and brain are essentially separate but have some mutual interaction (interactive dualism). This last was the view of Descartes. (vi) Mind is like 'software' of the brain (hardware).'

GREGORY, R.L. (Ed.). 1987. *The Oxford Companion to the Mind*. Oxford University Press. p.204

it is certain that I (that is, my mind by which I am what I am) is entirely and truly distinct from my body and may exist without it.²¹

The link between mind and body for Descartes was the pineal gland. In *Provisions of the Soul, Article XLI* he wrote 'The whole action of the mind consists in this, by the simple fact of willing anything it causes a little gland, to which it is closely joined, to produce the result appropriate to the volition.' This philosophy was developed further by a group of philosophers who followed Descartes' teachings and were referred to as the Cartesians. Hunt suggests that their aim was to prove that there was 'no causal contact between body and mind'. The Christian idea of god was pivotal to these theories and enabled the explanation that physical happenings were paralleled by mental events.²²

For Descartes will was a powerful mental entity, and the misuse of the will explained why man was sinful even though he was the creation of a Christian god:

From all this I discover, however, that neither the power of willing, which I have received from God, is of itself the source of my errors, for it is exceedingly ample and perfect in its kind; nor even the power of understanding, for as I conceive no object unless by means of the faculty that God bestowed upon me, all that I conceive is doubtless rightly conceived by me, and it is impossible for me to be deceived in it.

Whence, then spring my errors? They arise from this cause alone, that I do not restrain the will, ... it readily falls into error and sin by choosing the false in room of the true, and evil instead of good.²³

Developments in science and technology, particularly the growth of behaviourist and materialist²⁴ explanations of human behaviour, were inevitably to lead to a revision of the ideas

21 DESCARTES, R. *The Meditations and Selections from the Principles: Meditation VI.* trans. VEITCH, J. 1988. La Salle, Illinois: Open Court. p.91

22 HUNT, M. 1993. p.68

23 DESCARTES, R. p.69

24 The distinction between materialism and dualism at its boundary is hard to define. Possibly the best explanation of the distinction is the following:

'The word 'materialism' sometimes misleads. The materialist is not committed to a Newtonian 'billiard-ball' account of matter. Keith Campbell has spoken of the 'relativity of materialism'—its relativity to the physics of the day. Materialism is best interpreted as the
(continued...)

of Cartesian dualism.²⁵ It also led to the questioning of the causal power of will.²⁶ Scientific arguments tended to question the traditional role of an omnipotent god creating the world and

24(...continued)

doctrine that the fundamental laws and principles of nature are exhausted by the laws and principles of physics, however 'unmaterialistic' the latter laws and principles may be. Instead of speaking of 'materialism' some writers use the term 'physicalism'.

Materialist accounts of the mind may be subdivided into *peripheralist* and *centralist* views. A more familiar name for the peripheralist view is behaviourism: the view that possession of a mind is constituted by nothing more than the engaging in of especially sophisticated types of overt behaviour, or being disposed to engage in such behaviour in suitable circumstances. Behaviourism as a philosophical doctrine must be distinguished from the mere methodological behaviourism of many psychologists who do not wish to base scientific findings upon introspective reports of processes that are not publicly observable.

Very much more fashionable at the present time among philosophers inclined to materialism is the centralist view, which identifies mental processes with purely physical processes in the central nervous system. This view is sometimes called *central-state materialism* or, even more frequently, the *identity* view. Unlike behaviourism, it allows the existence of 'inner' mental processes which interact causally with the rest of the body.

It remains to call attention to one important variety of theory intermediate between orthodox dualism and orthodox materialism. It is a 'one substance' view, denying that minds are things or collections of things set over against the material substance which is the brain. But it does involve a dualism of properties, because brain processes, besides their physical properties, are conceived of as having further non-physical properties which are supposed to make the brain processes into *mental* processes. Such views may be called *attribute* or *dual-attribute* theories of the mind-body relationship. A theory of this sort could be said to be a variety of identity view, since it also holds that mental processes are identical with certain brain processes.

According to the doctrine of *panpsychism*, not simply brain processes but all physical things have a mental side, aspect, or properties, even if in a primitive and undeveloped form.

Although the dual-attribute view is important, it inherits the considerable difficulty and confusion which surrounds the philosophical theory of properties. There are many difficulties in giving a satisfactory account of what it is for a thing to have a property, and these difficulties transmit themselves to this sort of theory of the mind-body relationship.

ARMSTRONG, D.M. Mind Body Problem: Philosophical Theories. in GREGORY, R.L. (Ed.) p.491. Emphasis in original

25 Darwin's theory of evolution, *The Origin of Species* was first published in 1859. As a result of increasing scientific knowledge man seemed to have a greater ability than before to examine and explain his environment and the behaviour of human beings, and this in turn led him to question the idea of separate mental states divorced from physical reality, linked to bodily states only through the medium of a pineal gland

26 For a thorough critique of dualism see SMITH, P. & JONES, O.R. 1986. *The Philosophy of the Mind*. Cambridge University Press. See also for a selection of readings on the philosophical debate LYONS, W. (Ed.). 1995. *Modern Philosophy of the Mind*. London: Everyman. For a review of mental causation see HEIL, J. & MELE, A. (Eds.). 1993. *Mental Causation*. Oxford University Press. For an analysis of different approaches to the mind see HUNDERT, E.M. 1989. *Philosophy, Psychiatry and Neuroscience - Three Approaches to the Mind*. Oxford University Press

to reject the Christian world view. Therefore, Augustine's and Descartes' notions of will were open to challenge scientifically. The relevance of will as a causal power was savagely attacked.

If behaviorism and materialism possess a common ground, it is that upon which rejections of *autonomous man* have always stood. Both have judged the idea of autonomous man to be laden with mysticism, religiosity, and superstitious musing. The notion of 'free will' in a determined universe violates every canon of parsimony, scientific unity and positivism.²⁷

The argument concerning dualism and the separateness of mind and body states continues to this day as part of the debate surrounding philosophical and neuroscientific constructions of consciousness. Definitions of consciousness are relevant to this thesis because consciousness is used by the courts to evaluate what involuntary action in the sense of automatism might be. Discussions of what consciousness might be encounter difficulty when mechanistic, reductionist or materialistic definitions of the mind are put forward to explain human behaviour. Chalmers has argued that it is not possible to take consciousness seriously and remain a materialist.²⁸ However, reductionist explanations of action have been employed by legal theorists in their explanation of voluntary movement.

One of the problems for consciousness researchers lies in explaining the common perception that individual human behaviour influences events. Such explanations become complicated

27 ROBINSON, D.N. 1986. p.452. Emphasis in original

28 CHALMERS, D.J. 1996. *The Conscious Mind*. Oxford University Press. To Chalmers materialist explanations are seen as too reductionist. He argues that to obtain a satisfactory explanation of consciousness it is necessary to 'embrace a form of dualism.' Chalmers accepts that materialism has the advantage of simplicity but, states materialism cannot 'account for the phenomenon that need to be explained.' Chalmers also rejects the inductive argument that 'materialism has always worked elsewhere'. He sees this as 'easy to defeat', by the argument that materialism works where what is to be explained are 'structures and functions'. 'But with consciousness, uniquely, we need to explain more than structures and functions, so there is little reason to expect an explanation to be similar in kind.' Chalmers argues for a form of property dualism which occurs by a 'natural supervenience network' which allows the physical and non physical to interact, thus the mental experience of self awareness supervenes on the physical process of neurons firing in the brain: 'There is a system of [natural] laws that ensures that a given physical configuration will be accompanied by a given experience, just as there are laws that dictate that a given physical object will gravitationally affect others in a certain way.' p.168 - 70

when they are rooted in physical theories regarding the behaviour of matter. However, it is a common belief that people are responsible for their actions. Indeed the criminal law accepts this view of human behaviour. Lord Simon refers to the ‘legal axiom of the freedom of the will’ and describes it as follows:

Dr. Johnson in his *Dictionary of the English Language* defined ‘free will’ as ‘the power of directing our own action without restraint by necessity or fate,’ a definition repeated by the *Oxford English Dictionary*. Dr. Johnson was of course speaking in metaphysical or theological terms. But his definition seems to me equally relevant in law.²⁹

It seems clear from this that Lord Simon is of the opinion that people may, normally, be held responsible for their own actions. Similarly, Penrose thinks that:

The legal issue of ‘responsibility’ seems to imply that there is indeed, within each of us, an independent ‘self’ with its *own* responsibilities - and by implication, rights - whose actions are *not* attributable to inheritance, environment, or chance. If it is other than a mere convenience of language that we speak as though there were such an independent ‘self’, then there must be an ingredient missing from our present day physical understanding. The discovery of such an ingredient would surely profoundly alter our scientific outlook.³⁰

But how is the existence of such a self to be explained scientifically? Neither Penrose nor Chalmers supply the answer to the question: how does conscious experience of an inner self arise from physical processes in the mind? Chalmers argues that the question is irrelevant; ‘the search for such a connection is misguided. Even with fundamental physical laws, we cannot find a “connection” that does the work. Things simply happen in accordance with the law; beyond a certain point, there is no asking “how”. As Hume showed, the quest for ultimate connections is fruitless.’³¹

29 *DPP for Northern Ireland v Lynch* [1975] AC 653, 690. Emphasis in original

30 PENROSE, R. 1994. *Shadows of the Mind*. Oxford University Press. p.36. Emphasis in original

31 CHALMERS, D. 1996. p.170

Penrose is more circumspect:

This book will not supply an answer to those deep issues, but I believe that it may open the door to them by a crack - albeit only a crack. It will not tell us that there need necessarily be a 'self' whose actions are not attributable to external cause, but it will tell us to broaden our view as to the nature of what a cause might be. A cause might be something that cannot be computed in practice or in principle. I shall argue that when cause is the effect of our conscious actions, then it must be something very subtle, certainly beyond computation, beyond chaos, and also beyond any purely random influences. Whether such a concept of 'cause' could lead us any closer to an understanding of the profound issue (or the illusion?) of our free wills is a matter for the future.³²

Searle sees the debate surrounding dualism as an arid distraction from the meaningful discussion of consciousness. For Searle the way forward is to 'reject both materialism and dualism, and accept that consciousness is both a qualitative, subjective "mental" phenomenon and at the same time part of the "physical world".' Searle wants to abandon the distinction between mental and physical, to abandon 'the traditional physical categories.' These objectives provide a challenge to the traditional structure of the criminal law which views action as having separate and separable mens rea and actus reus elements. On Searle's view consciousness and the explanation of it is important because, '[o]nly to conscious agents can there ever be a question of anything mattering or having importance at all.'³³ Searle argues that the choice is not between dualism and materialism:

What I am trying to do is to redraw the conceptual map: if you have a map on which there are only two mutually exclusive territories, the 'mental' and the 'physical,' you have a hopeless map and you will never find your way about. In the real world, there are lots of territories—economic, political, meteorological, athletic, social,

32 PENROSE, R. 1994. p.36

33 All quotations in this paragraph taken from SEARLE, J.R. 1997. *The Mystery of Consciousness*. London: Granta. p.xiv

mathematical, chemical, physical, literary, artistic, etc. These are all parts of one unified world.³⁴

Searle's construction of what it means to act has been influential and formed part of his 1984 Reith Lecture Series.³⁵ His explanation of action has implications for the criminal law.

Anglo-American criminal law recognises the importance of subjective mental processes in its doctrinal structure, that is the mens rea and voluntary act requirements. However it does not accept the premise that only subjective testimony is relevant to determinations of criminal liability. Indeed it could not because of the basic principle of the criminal law that the state must prove its case against the defendant beyond reasonable doubt. The defendant is not obliged to testify in her own defence.³⁶ Therefore, objective evidence of subjective mental states may well be necessary for a determination of guilt or innocence to be made. Therefore any legal process built upon a Cartesian view of volition would immediately encounter insurmountable practical difficulties where a defendant refused to give evidence at trial. There would simply be no acceptable means of establishing the defendant's mental state at the time of the act. Cartesian dualism denies that others can have access to personal mental experiences. This would mean that the court could not know the thoughts of the perpetrator of a particular act. To subscribe to this line of argument would not be likely to achieve an adequate system of justice because from a Cartesian standpoint the drawing of inferences from behaviour is invalid.

34 Searle does not see this as an easy task.

'This is an obvious point, but such is the power of our Cartesian heritage that it is very hard to grasp. In my experience, undergraduates can grasp this point fairly easily, graduate students barely, but for most professional philosophers it seems too difficult. They think my position must be either 'materialism' or 'property dualism.' How could one be neither a materialist nor a dualist—as absurd an idea as being neither a Republican nor a Democrat!'

SEARLE, J.R. 1997. p.195

35 Published as: 1984. *Minds, Brains and Science*. London: Penguin. For a discussion of Searle's explanation of action see chapters 4 and 5

36 However, in England and Wales, 'proper inferences' may now be drawn from her silence at trial under s 35 of the Criminal Justice and Public Order Act 1994

However, as Lacey et al. point out the criminal law does show allegiance to a weaker form of dualism than that put forward by the Cartesians.

The actus reus/mens rea framework builds in at a deep level a commitment to philosophical dualism - the idea that a person's thoughts and her actions are separate and separable in our descriptions and analyses. On this view, we first of all describe what the defendant did, in terms of 'colourless acts', and then infer from that what was in the defendant's mind. Yet, in practice, we do not react to human behaviour in this way, but rather make a global judgment which encompasses act and attitude, rather than separate mental state.³⁷

In examining constructions of involuntary action this thesis has to consider the role of the psychological element that Lord Simon describes as volition. It has to consider, amongst other questions, how a lack of 'volition', to use Lord Simon's terminology may be asserted as a defence and how the discourses of the modern philosophy of the mind and neuroscience impact upon the criminal law's definition of what it means to 'lack volition' and yet to 'act'.

The criminal law's requirement for voluntary bodily movement and mechanistic explanations of action

Mackay states '[a]lthough the origin of the word "automatism" as applied to the criminal law is difficult to trace, its sudden appearance in the 1950's seems to have reflected the courts increasing awareness of the practical need for a voluntary act before an accused could be convicted.'³⁸

Fitzgerald, argues that the problem for jurists is that they conflate two separate questions; '(1) what is an act? (2) when is conduct involuntary?' Fitzgerald suggests that

37 LACEY, N., WELLS, C., & MEURE, D. 1994. *Reconstructing the Criminal Law*. London: Butterworths, p.36-7

38 MACKAY, R.D. 1995. *Mental Condition Defences in the Criminal Law*. Oxford: Clarendon. p.30

The problem of defining an act owes its importance partly to the constant recurrence throughout the common law of a certain theme, namely the requirement of an act ... This problem ... gains further significance from the recognition by the common law that ... involuntary conduct, does not involve the actor in any responsibility because it is said there is in reality no act on his part. For this reason it becomes necessary to define the term 'act' to provide the test by which we can decide whether a man's conduct should involve him in any responsibility.³⁹

In his book, *Act and Crime*, Moore says 'we end up, then, with the notion of an act as a willed bodily movement that is indeed the opposite (contrary or contradictory) of status, mental event, omission and involuntary bodily movement.'^{40 41} It would seem from this statement that Moore is suggesting that a willed bodily movement is, on one description, the opposite of a mental event. This is an explanation of movement which some philosophers and neuroscientists would find hard to accept. Many neuroscientists would argue that all bodily movement with the exception of some reflexes or muscle spasms would be traceable to an event or series of events within the brain.⁴² Searle here would not distinguish the brain from the mind as some judges and legal commentators have done.⁴³ Searle would argue that it is distinctly unhelpful when describing action to separate mental and physical events in this way. The criminal law has however traditionally made some separation between the mental and the physical in terms of the attribution of criminal responsibility.

Jurisprudentially an act has been expressed in terms of voluntary bodily movement. Moore bases his view of voluntary action in part on the explanation of voluntary action by John Austin. Austin wrote: '[a] voluntary movement of my body, or a movement which follows a volition is an act. The involuntary movements which are the consequences of certain diseases

39 FITZGERALD, P.J. 1961. Voluntary and Involuntary Acts. in GUEST, A.G. (Ed.). *Oxford Essays in Jurisprudence*. Oxford: Clarendon. p.1

40 MOORE, M. 1993. *Act and Crime*. Oxford: Clarendon. p.39-40

41 See (1994) 142 *UPLR* for a discussion of Moore's views and MOORE, M. 1997. *Placing the Blame*. Oxford: Clarendon

42 See the discussion of Greenfield's work in chapter 4

43 See chapter 5 and discussion later in this chapter

are not acts.’⁴⁴ He rejected any idea of the will as a mental power, but said that: ‘[c]ertain parts of the human body obey the will.’⁴⁵ In Austin’s view the mind was not controlled by the will because it was impossible to will that thinking on a certain topic cease or the mind to remember something which had been forgotten.⁴⁶ Only the physical movements of the body were in Austin’s view subject to volitional control. Voluntariness in this sense is a very minimalist concept indeed.

On the subject of how the body obeys the will Austin said ‘[a]ll that I am able to discover when I will a movement of my body amounts to this; I wish the movement.’⁴⁷ Austin separated the desire for movement, ‘volition’, from other wishes and desires by its ability to stimulate immediate bodily movement. On this explanation volition is a psychological element solely tied to bodily movement. Austin makes an ‘incidental excursion into the philosophy of the mind’⁴⁸, in order to establish a framework of criminal liability. Austin’s justification of the digression is threefold and is important because it shows the difficulty of defining action as a measure of criminal responsibility.

Firstly, Austin wishes to make clear the meaning of ‘Duty’ and to do this he needs to clarify the expressions ‘Motive’ and ‘Will’. Secondly, he needs to make clear what items are the ‘objects of duties. These are “acts or forbearances.”’ Herein lies the relevance of volition to his overall thesis. Austin says ‘every act and every forbearance from an act, is the consequence of a volition, or of a “determination of the will”’.⁴⁹ It is only for acts and forbearances that a

44 Austin’s conception of action has been widely discussed see, inter alia, FITZGERALD, P. 1961. p.1-28, HART, H.L.A. 1968. *Punishment and Responsibility*. Oxford University Press. MOORE, M. 1993 and MACKAY, R.D. 1995

45 AUSTIN, J. 1869. *Austin on Jurisprudence*. vol. 1 (3rd edit.). London: John Murray. p.423

46 AUSTIN, J. 1869. p.426

47 AUSTIN, J. 1869. p.424

48 AUSTIN, J. 1869. p.422

49 AUSTIN, J. 1869. p.423

defendant may be held criminally liable. Volition though a minimalist trigger is the root of criminal responsibility in Austin's explanation.⁵⁰

In order to avoid the concept of will becoming too powerful and to make his explanation of legal liability have some consistency, Austin was concerned to avoid definitions of will which placed too much emphasis on willing as a cause of action. He was influenced in his view of causation by Thomas Brown,⁵¹ who wrote of the effect of will as a causal power, 'this same will is just nothing at all.' Austin utilised Brown's description in his lectures.⁵² Brown was examining 'volition' as part of his overall thesis regarding cause and effect, preferring a modified Humean evaluation of causation.⁵³ Austin encounters problems in defining what an 'act or forbearance' might be. In defining what actions are meaningful for legal responsibility difficulties arise in distinguishing between reasons for acting and acts as causes. The real problem for Austin's definition is whether his concept of volition describes anything that is meaningful. Whether it can actually distinguish between voluntariness and involuntariness. Austin reduces voluntariness to a contradictory notion. He does not explain why he does not consider it possible to will mental events though it is in his view possible to use a volition to cause bodily movements, he just asserts that this is so. A further problem with Austin's explanation is that it suggests that a volition to move muscles is something that is identifiable as a psychological item. Such a description is not sustainable when examined in the context of

50 AUSTIN, J. 1869. Austin says that it is necessary to distinguish between intentional and negligent injury. Thus 'intention' had to be distinguished from will. According to Austin 'volition' and 'intention' must be clearly defined to achieve this because: 'although intention is not a volition the facts are inseparably connected.' p.423

51 Brown T. (1778-1820). It has been argued that 'Brown's analysis [of causation] was better known in the first half of the nineteenth century than Hume's now classic discussion.' SMITH, R. 1981. *Trial by Medicine*, Edinburgh University Press. p.73

52 AUSTIN, J. 1869. p.424

53 1818. *Enquiry into Cause and Effect*. (3rd edit.) Constable. Hume wrote of volition: 'The same difficulty occurs in contemplating the operations of mind on body; where we observe the motion of the latter to follow upon the volition of the former; but we are not able to observe or conceive the tie, which binds together the motion and volition, or the energy by which the mind produces this effect.' HUME, D. *Enquiry Concerning Human Understanding*. Section IV. Part II. in GEIRSSON, H. & LOSONSKY, M. 1998. *Beginning Metaphysics*. Oxford: Blackwell. p.254

modern neuroscientific and philosophical descriptions of consciousness and action. However, Austin's description of voluntary action is still utilised by jurists today. Moore, has adapted Austin's definition to fit within a functionalist⁵⁴ description of how events in the mind might cause the body to move.⁵⁵

There are therefore questions with regard to criminal responsibility that reductionist or mechanistic explanations of human behaviour will find difficulty in addressing. Mechanistic descriptions of human action are based in the science of physics. Dennett sees physical laws as of use in explaining the emergence of a sense of self. Considering how a mind might give directives to a brain, he writes:

These [the directives] are not physical; they are not light waves or sound waves or cosmic rays or streams of subatomic particles. No physical energy or mass is associated with them. How, then, do they get to make a difference to what happens to the brain cells they must affect, if the mind is to have any influence over the body? A fundamental principle of physics is that any change in trajectory of a physical activity is an acceleration requiring the expenditure of energy, and where is this energy to come from? It is this principle of the conservation of energy that accounts for the physical impossibility of 'perpetual motion machines', and the same principle is apparently violated by dualism. This confrontation between quite standard physics and dualism has been endlessly discussed since Descartes's own day, and is widely regarded as the inescapable flaw of dualism.⁵⁶

However, there are difficulties with the acceptance of a purely scientifically based description of action. The difference between causal explanations and less reductionist views of the mind's interaction with the body is well expressed in *The View from Nowhere*⁵⁷ where Nagel challenges any account of behaviour which seeks to explain mental events solely in objective terms. Nagel argues that it is the quality of individual perceptions which determine what it is

54 See footnote 66

55 MOORE, M. 1993

56 DENNETT, D. 1991. *Consciousness Explained*. London: Penguin. p.35

57 1986. Oxford University Press

like to be a particular person.⁵⁸ Whilst Nagel accepts that 'dualism of mind and body is conceivable,' he feels it is 'implausible.' However, he argues that physical reality is not the only reality. He writes:

The reductionist program that dominates current work in the philosophy of mind is completely misguided, because it is based on the groundless assumption that a particular conception of objective reality is exhaustive of what there is. Eventually, I believe, current attempts to understand the mind by analogy with man-made computers that can perform superbly some of the same external tasks as conscious beings will be recognized as a gigantic waste of time. The true principles underlying the mind will be discovered, if at all, only by a more direct approach.⁵⁹

'The confrontation', as Dennett describes it, exists not just between dualists and materialists but also between those who view physical explanations as complete and those who do not. Nagel argues that there is 'more to reality than what can be accommodated by the physical conception of objectivity.'⁶⁰ Most simply explained the confrontation relates to two types of explanations for events.⁶¹ The world, as viewed from the scientific viewpoint, as explained by Dennett is causally closed. This view of action restricts explanations in several ways. The explanation is couched in physical terms, so neurons firing in the brain cause movement, and the human action that results from the neuronal firings can only be explained from the point of view of a third person, the observer. Subjective explanations tend to dualism because some

58 See NAGEL, T. 1974. What is it Like to Be a Bat? *Philosophical Review*, 1974, vol. 83, 435-50

59 NAGEL, T. 1986. p.16

60 NAGEL, T. 1986. p.15

61 Dualist theories of the mind have attracted much academic criticism from materialists. Ryle, was so irritated by the conception that he wrote 'The official theory. I shall often speak of it, with deliberate abusiveness, as the 'dogma of the Ghost in the Machine'... It is a big mistake and a mistake of a special kind ... a category mistake'. Ryle's argument, put simply, is that there is no separate mental life. Body and mind are unified, two complex structures but belonging to the same category, not extant on separate but parallel planes. Ryle totally rejected the dualist conception of an inner observer in the brain, his equivalent of the 'ghost in the machine'. RYLE, G. The Concept of the Mind. in PICKERING, J. & SKINNER, M. (Eds.). 1990. *From Sentience to Symbols*. University of Toronto Press. p.22. For a modern materialist discussion of conceptions of behaviour see CHURCHLAND, P. 1995. *The Engine of Reason, the Seat of the Soul*. Cambridge, Mass.: MIT Press

subjective explanations may be said to give precedence to the epiphenomenal⁶² in accounts of

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- 62 'Epiphenomenalism. Group of doctrines about mental—physical causal relations, which view some or all aspects of mentality as by-products of the physical goings-on in the world.

The classic definition (e.g. in C. D. Broad, *The Mind and its Place in Nature* (1925)) ensures that epiphenomenalism is a species of dualism. Whereas Descartes, an interactionist, held that mental things both cause and are caused by physical things, the epiphenomenalist holds that mental things do not cause physical things although they are caused by them. The epiphenomenalist then can accept that there are no causal influences on physical events besides other physical events, and thus can escape one objection sometimes raised against dualism. But the epiphenomenalist's picture of mental events as tacked on to the physical world, having no causal influence there, is unappealing: she would seem to think that mental things feature in the world as accompanying shadows of the physical—in the realm of 'pure experience'.

Some non-dualist positions are accused of commitment to epiphenomenalism. The idea is that the mental is not caught in the physical causal net, but now not because mental *things* aren't caught there, but because mental properties of things aren't caught there, these not being causally relevant properties. The picture again is one in which mentality appears causally idle.

Two contemporary physicalist doctrines are alleged to have specific epiphenomenalist consequences. The first is functionalism, which holds that types of mental states are definable in terms of the causal roles played by their tokens in an interconnected network. An objection has it that a causal account omits something crucial to some mental states—namely the intrinsic nature of those states, which is accessible only from a first-person perspective. Some functionalists concede the objection, and say that although the mental can be circumscribed by way of its operation in the causal world, none the less subjective features of experience, sometimes called qualia, must be acknowledged, and these indeed are epiphenomenal.

Davidson's anomalous monism is the other physicalist position attacked on grounds of supposed epiphenomenalist commitments. Davidson holds that explanations which introduce terms like 'believe' and 'desire' are causal explanations; and he argues that beliefs and desires are physical by arguing that vocabulary used in stating physical laws applies to them. An objection claims that because the real causal power of any state which has a mental property must be seen, from Davidson's perspective, to reside in some lawlike physical property that it has, mental properties must be acknowledged by Davidson to be not genuinely causally relevant, but rather epiphenomenal, inefficacious. An answer may be that, since there are two different sorts of causal explanation, some events simply do possess two different properties each of which has causal relevance. But a problem may remain: it seems that conceiving of mental events in the physical terms in which causal laws are framed, it can be hard to persist in thinking that our talk of them using mental terms can offer genuinely causal explanations of what happens.

The objection made to Davidson might be made against any materialist who allows a gap between, on the one hand, the metaphysics of mental causation, which concentrates on properties characterized in the physical sciences, and, on the other hand, what we actually know about the nature and existence of mental causation, which derives from everyday explanations of people and their doings.'

HORN, J. 1995. Epiphenomenalism. in HONDERICH, T. (Ed.). 1995. *The Oxford Companion to Philosophy*. Oxford University Press. p.241. Emphasis in original

action. Therefore reductionist explanations of behaviour have been favoured by scientists because they focus attention on the bodily mechanisms that they seek to understand. Clearly such explanations are relevant to understanding movement in that they may illuminate common misconceptions. It is for example helpful to know the world is round and to understand the laws of gravity. A question that will be examined in this thesis is whether reductionist explanations of movement are useful to the criminal law?

Morse discusses causation in the criminal law and its application to excuses. He points out that causation itself cannot be an excuse. Otherwise, no one could be criminally responsible for anything.⁶³ Therefore, what is important in assessments of culpability or blame is something other than causation. Rosenberg suggests that ‘unlike other causes, beliefs and desires are also *reasons* for action: they render it intelligible. So, perhaps explanations in ordinary life work by showing actions are reasonable, efficient, appropriate or rational in the light of the agent’s beliefs and desires.’ Rosenberg argues that in order to understand action we need to make it ‘rationally intelligible’ and herein lies the problem with causal laws: ‘[c]ausal laws don’t provide intelligibility.’⁶⁴ Rosenberg suggests that it is the rationality of actions which make them explicable. The explanation of actions in his view lies in exploring the philosophical concept of intentionality.⁶⁵

The consideration of criminal responsibility and involuntary action is further complicated by the normative requirements of the criminal law. Austin in his discussion of intention and will is trying to outline the component parts of his normative explanation of the legal system. In order to maintain the distinction between negligent and intentional injury, Austin distinguishes intention from volition. To do this Austin links ‘intention’ to the consequences of action. He

63 ‘If causation were an excuse, no one would be responsible for any conduct, and society would not be concerned with moral and legal responsibility and excuse.’ MORSE, S.J. 1996. *Brain and Blame*. (1996) 84 *The Georgetown Law Journal* 527-49. p.532

64 ROSENBERG, A. 1999. *The Explanation of Human Action*. in KATZ, L., MOORE, M., & MORSE, S.J. 1999. *Foundations of the Criminal Law*. Oxford University Press. 204-13. p.206. Emphasis in original

65 See chapter 4 for a discussion of some of the philosophical explanations of action

seeks to supply some reason why action takes place and identifies a belief or desire which he calls 'motive' which is a 'wish causing or preceding a volition'. Austin therefore ends up with three psychological items all related to each other and to movement. Volition may be tied solely to bodily movements, but it is caused by another psychological item, motive.

However motive is not included within the most commonly cited part of Austin's discussion of voluntary action:

Certain movements of our bodies follow invariably and *immediately* our wishes or desires for those *same* movements: Provided, that is, that the bodily organ be sane, and the desired movements be not prevented by any outward obstacle... These antecedent wishes and these consequent movements, are human *volitions* and *acts* strictly and properly so called... And as these are the only *volitions*; so are the bodily movements, by which they are immediately followed, the only *acts* or *actions* (properly so called). It will be admitted on the mere statement, that the only objects which can be called acts, are consequences of volitions. A voluntary movement of my body, or a movement which follows a volition, is an *act*. The involuntary movements which are the consequence of certain diseases, are *not* acts. But as the bodily movements which immediately follows volition, are the only *ends* of volition, it follows that those bodily movements are the only objects to which the term 'acts' can be applied with perfect precision and propriety... Most of the names which seem to be names of acts, are names of acts, *coupled with certain of their consequences*. For example, if I kill you with a gun or pistol I *shoot* you: and the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an *act* perpetrated by me. In truth, the only parts of the train which are my act or acts are the muscular motions by which I raise the weapon; point it at your head or body, and pull the trigger. These I *will*. The contact of the flint and steel; the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are *consequences* of the act which I *will*, I *will* not those consequences, though I may *intend* them.⁶⁶

If this explanation of action, which omits motivation is accepted, there is a further and immediate problem because it seems that volition as a psychological item can have little meaning in the equation of criminal liability. It is hard to imagine a movement which would not

66 AUSTIN, J. 1869. p.427-8. Emphasis in original. Quoted in HART, H.L.A. 1968. p.98. Also quoted in MACKAY, R.D. 1995. p.9

be accompanied by this minimal 'volition.' Austin says: 'A voluntary movement of my body, or a movement that follows a volition, is an act. The involuntary movements which are the consequences of certain diseases are not acts.' The question is, is the distinction valid?

It seems that on a twenty first century view of the mind this is unlikely to be true. The movements of a diseased body may well be caused by the minimal desire in the brain for a bodily movement which Austin calls a volition. The exclusion of overarching wishes and desires for movement from the description of voluntary action; and the use of volition, as a psychological item, a specific type of desire for muscular contractions in Austin's definition of willed bodily movement is too reductionist. In fact it is arguable that it is so reductionist that it is meaningless. However this description of willed bodily movement, without reference to Austin's explanation of motivation is still utilised by criminal theorists today.

Clearly science and philosophy must have a contribution to make to the definition of action, but certain types of action description are more useful to scientific evaluation than to explanations of human behaviour, particularly certain explanations of what it means to be 'conscious' and to 'act'. Philosophers such as Dennett claim that the idea of an omnipresent observer in the brain is an illusion. On this view the sense of volitional control of action is pure folk psychology.⁶⁷ However, such a view seems counter intuitive. As Penrose points out an 'independent self' is required before criminal liability may be imposed. Criminal courts assume that people have conscious control over their actions and therefore may be liable for their outcomes. Perhaps this is why the interpretation given by the courts to the meaning of involuntary action, as it applies in the defence of automatism, is not so reductionist as Austin's discussion of voluntary bodily movement might suggest. In *Bratty v Attorney General for Northern Ireland* the Lord Chancellor defined automatism as:

67 Folk psychology - 'our first person "folk psychology" account of ourselves with our scientific understanding of the world.' LIBET, B., FREEMAN, A., & SUTHERLAND, K. (Eds.). 1999. The Volitional Brain. *Journal of Consciousness Studies*, 1999, vol. 6, no. 8-9, ix-xxii, p.ix

Connoting the state of a person who, though capable of action, is not conscious of what he is doing ... It means unconscious involuntary action and it is a defence because the mind does not go with what is being done.⁶⁸

It has been argued that Austin's definition of volition and its relation to movement, because of its limited meaning is unhelpful in making evaluations of criminal responsibility based on action more intelligible. Viscount Kilmuir in *Bratty* seems to have considered consciousness as a useful tool in the evaluation of criminal responsibility. Is consciousness likely to be a more helpful conception?

Whether consciousness of volitional control exists, has been the subject of intensive discussion in the *Journal of Consciousness Studies*.⁶⁹ In the introduction to the discussion the problem in the Journal the editors comment that: 'most people are agreed that we all "know" that we have some degree of volition control over the sort of experiences we undergo. But when we try to reconcile this with our physics - and biology - based understanding of the world, we run into a series of serious and well documented problems.'⁷⁰

Not the least of these problems concerns the attribution of personal responsibility. The law assumes that people are responsible for their actions and that it is just to punish them for blameworthy actions. It considers personal testimony and evidence to determine whether a person's actions were voluntary. It is a requirement of the criminal law that a defendant's actions may be said to be voluntary before criminal liability is imposed. Even though it is presumed that this is the case unless there is evidence to the contrary. As previously discussed, Smith states that voluntariness is fundamental to criminal liability. However, if scientific and biological arguments which deny free will are accepted as the basis for action explanations, personal responsibility is either removed or demoted in the explanations of action. This raises

68 *Bratty v A.G. for Northern Ireland* [1963] AC 386, 401 (Viscount Kilmuir) repeating the definition given by the Court of Appeal

69 See 1999, vol. 6, no. 8-9 and 1999 vol. 6, no. 10

70 LIBET, B. et al. (Eds.). 1999. p.ix

the question discussed earlier in relation to Morse's comments concerning reductive scientific explanations. Why hold someone responsible for their actions at all?

The law presumes that personal choices are relevant in considering the culpability of a defendant. Indeed the criminal law is dependent in its constructions of liability upon the idea that people may be held responsible for their actions, and punishment is predicated upon this basis.⁷¹ Some scientists argue that this is not a safe premise on which to found a legal system.⁷² The discussion of these matters is closely linked to the debates surrounding dualism and determinism.⁷³ The relevance of the debate to the criminal law is clearly expressed in *The Volitional Brain*:

If the distinction between things we do through choice and necessity has no scientific validity, then the consequences need to be addressed as a matter of urgency. The problem is starting to move beyond the scope of armchair philosophers and concerns the future shape of society and civilization. Already scientists are starting to draw some very radical conclusions as to how our legal system could be recast on a more scientific basis (Blakemore, 1988; Crick, 1994). But many would say that such a fundamental change should grow out of a major debate in which philosophy, sociology, ethics, religion, law and political considerations all had a voice.⁷⁴

This thesis aims to add a legal perspective to this debate, particularly an English criminal law perspective based upon a consideration of the defence of automatism and the discussion by the courts in England and in other jurisdictions as to how the defence might operate. The thesis is therefore split into three parts. Chapters 2 and 3 consider the law of automatism as it operates in England and Wales, some medical commentary on the defence of automatism, and some of the approaches adopted in other jurisdictions. Chapter 4 examines some neuroscientific and philosophical approaches to action and their relevance to the criminal law. Chapter 5 looks at

71 For a discussion of the philosophy relating to punishment see NORRIE, A. 1991. *Law Ideology and Punishment*. Kluwer

72 See BLAKEMORE, C. 1988. *The Mind Machine*. London: BBC and CRICK, F.H.C. 1994. *The Astonishing Hypothesis*. London: Simon & Schuster

73 This debate is discussed in relation to criminal responsibility in chapter 5

74 LIBET B. et al. (Eds.). 1999. p.xiii

constructions of responsibility within the criminal law, and considers whether neuroscientific and philosophical explanations of volitional control might assist the criminal law in judging when action is involuntary. The conclusion suggests amendments to the present law to remove inconsistencies and injustices.

Chapter 2

The aim of the next two chapters is to examine the growth of the automatism defence within the law of England and Wales and to make reference to cases from other jurisdictions which either illuminate certain problems posed by the present operation of the defence or provide a contrasting approach to the definition of the defence. When reading the case law relating to automatism,¹ it is striking how often reference is made by judges to the policy considerations underlying judicial attitudes to the defence. The reason for this emphasis on policy arises, in part, from the close overlap between the insanity and the automatism defences. Indeed the automatism defence in most of the jurisdictions examined divides into two categories. The first, non-insane automatism, which results in an acquittal and the second, insane automatism, which results in the court retaining powers of disposal over the defendant.² The policy reasoning behind the limitation of the defence was discussed by the Canadian Supreme Court in *R v Stone*³ which considered the Canadian case of *R v Rabey*⁴ and the English case of *R v Kemp*⁵ and concluded that the defence of insane automatism had grown out of a requirement by the courts to retain control over those who were thought to be suffering from what the law described as a 'disease of the mind'. The courts were concerned that those who were legally insane, but acted as an automaton should not go free. In *Stone*, Binnie J. considered the following comment made by Devlin J. in *Kemp*:

In the eyes of the common law if a man is not responsible for his actions he is entitled

1 This thesis examines the case law of six jurisdictions: England and Wales, Australia, Canada, New Zealand, Scotland, and the United States of America. It should be noted that in America different States recognise different forms of the defence. Some see automatism as a species of the insanity defence, some refer to it as automatism, others as unconsciousness, some do not acknowledge the defence. For a full review of the American case law see 27th ALR 4th p.1067-1143. For a discussion of the concept of automatism in the United States see LA FAVE, W. R. & SCOTT, A. W. Jr. 1986. *Criminal Law* (2nd edit.). St. Paul, Minnesota: West Publishing Co. 383-7

2 The precise terminology may vary. For example in Canada in *R v Stone* (1999) 134 CCC (3d) 353 the court said that in accordance with s.16 of the Canadian Criminal Code insane automatism should be referred to as mental disorder automatism

3 (1999) 134 CCC (3d) 353

4 [1980] 2 SCR 513

5 [1956] 3 All ER 249

to be acquitted by the ordinary form of acquittal, and it matters not whether his lack of responsibility was due to insanity or to any other cause.⁶

Binnie J. concluded that this common law position had been seen as unacceptable to the courts and that:

In response to the public danger posed by such an outcome, and to a developing understanding of mental disorder, the courts started down the path that eventually subsumed the notion of involuntary conduct into the concept of insanity where the involuntary conduct could be identified as the product of a disease of the mind. A successful plea of insanity led to the verdict of 'not guilty by reason of insanity', which carried with it the possibility of indefinite detention at the pleasure of the state.⁷

For these policy reasons courts have sought to control the defence of automatism in order to avoid the acquittal of defendants whom the court felt posed a danger to society.

The history of the defence and moral insanity

Historical evidence of automatism cases is limited. In *Trial by Medicine*, Smith offers an explanation for this from his reading of Victorian medical literature. This revealed that although medical experts cited cases of automatistic behaviour caused by: 'sleepwalking, hypnotic trances, spiritualist seances, or hysterical phobias, ... it was unusual for any of these to result in criminal proceedings.'⁸ Walker,⁹ refers to the occasional nature of automatism, which he describes as a condition in which it 'is said, a person may perform apparently purposive actions, automatically, without being in conscious control of his bodily movements.' He notes that of these unusual conditions sleepwalking was the first 'to be recognised'¹⁰, and

6 [1956] 3 All ER 249, 251

7 (1999) 134 CCC (3d) 353, 395-6 (Binnie J.)

8 SMITH, R. 1981. p.97

9 WALKER, N. 1968. *Crime and Insanity in England*, vol. 1. Edinburgh University Press. See particularly Chapter 10 Automatism and Drunkenness

10 WALKER, N. 1968. p.165. Both quotations

traces European sleepwalking defences back to the fourteenth century.¹¹ Although he notes ‘English lawyers were sufficiently insulated from their contemporaries from the fourteenth century onwards to avoid the importation of this defence’.¹²

Walker refers to the cases of Colonel Cheyney Culpepper, and Esther Griggs in England (both unreported cases) and to the case of Simon Fraser in Scotland. Culpepper was tried in 1686 for shooting a Guardsman and his horse. He claimed his sleepwalking was a common occurrence, and had evidence to support the assertion. He was found to be insane but eight days later he was pardoned. Esther Griggs threw her child out of the window whilst sleepwalking because she believed her house was on fire. She did not have to stand trial because the grand jury declined to ‘find a true bill against her.’ Walker comments ‘They were thus in effect acquitting her of responsibility for what she had undoubtably done’.¹³ Fraser battered his baby son to death, but the jury found that he was not responsible for his actions. An unusual verdict was returned which whilst not an acquittal meant that the only restriction on Fraser’s liberty was that he gave an undertaking that he would sleep alone¹⁴.

Both Smith and Eigen¹⁵ cite the growth of medical literature regarding unconscious mental states in Victorian times as giving impetus to certain claims of involuntariness in the courtroom.¹⁶ Eigen expresses this as follows:

11 As early as 1313 the Council of Vienne was responsible for a resolution to the effect that if a child, a madman or a sleeper killed or injured someone he was not held to be culpable. WALKER, N. 1968. p.166

12 WALKER, N. 1968. p.167

13 WALKER, N. 1968. p.169

14 *HM Advocate v. Fraser* (1878) 4 Couper 78

15 EIGEN, J.P. 1995. *Witnessing Insanity*. Yale University Press. p.172-5

16 ‘In 1837 a man indicted for stealing explained to the court: “I will not deny that I did take the fronts, but I was not conscious of what I was doing—I was labouring under an aberration of mind.” The prisoner directly asserted the possibility that mental functioning and (criminal) behavior could operate more or less independently. He was pleading not a blackout or memory failure but rather an inability to comprehend how and why he took the items. Ten years earlier, consciousness was mentioned by a sailor whose “contusions in [his] head” rendered him incapable of knowing what he was “about” when he drank. He summarized his role in the theft by saying, “I was unconscious of anything till I found myself in the watchhouse.” Certainly one approaches the use of so significant a term as “consciousness” with caution. The prisoner may
(continued...)

Cultural inquiry into mind-body relations broadened in the last decades of the eighteenth century. A host of human actions—pulse and respiration, for example—were noted to take place ‘unattended’ by consciousness. Epileptic or hysterical displays afforded compelling evidence of physical action without conscious motor control. Courtroom testimony suggests the currency of the notion of behavior unattended by consciousness, of a cultural imagination embracing the idea of variable states of ‘knowing’ akin to sleepwalking or automatism. The prospect of assigning moral blame to such mental states had to have been daunting. How was the jury to respond to a defense phrased as follows: ‘It was like a dream to me, when I saw the deed was done it struck me with terror instantly’?¹⁷

Smith suggests that the term automatism is derived from the tendency of 19th Century medical writers to refer ‘to “automatic”, “instinctive”, or “impulsive” acts, which they interpreted in the light of contemporary reflex action theories.’¹⁸ An example of this type of physiological theory is quoted by Bucknill and Tuke

Modern physiology teaches that there is a reflex action of the cerebrum, as well as of the spinal cord; and thus satisfactorily explains the existence of the automatic or instinctive acts. To such cases Dr. Carpenter alludes when he says, ‘So far as the directing influence of the will over the current of thought is suspended, the individual becomes a thinking automaton, destitute of the power to withdraw his attention from any idea or feeling by which his mind may be possessed, and is as irresistibly impelled, therefore, to act in accordance with this, as the lower animals are to act in accordance with their instincts.’¹⁹

Victorian psychiatrists used this physiological information to explain and excuse purposive

16 (...continued)

well have intended to signify his being “aware” or some other relatively ordinary state of “knowing.” Whatever his object, there remains the very real issue of what meaning “not conscious” conveyed to the jury when coupled with “labouring under an aberration of mind.” What conception of the mind explained such testimony?

EIGEN J. P. 1995 p. 172

17 EIGEN, J. P. 1995. p.173

18 SMITH, R. 1981. p.97

19 1858. *A Manual of Psychological Medicine*. [5], London: Churchill, p.193 quoting from CARPENTER W.B., 1853, *Principles of Human Physiology* (4th edit.). London: Churchill. p.840 quoted in SMITH 1981. p.97

actions²⁰ which would otherwise attract criminal liability, claims of this sort were made under the medical description of moral or impulsive insanity.²¹

Voluntary action and developments in the criminal law.

The courts disagreed with such medical explanations of human behaviour. Indeed the acceptance by the courts of the M’Naghten Rules to govern criminal responsibility in cases of insanity was to a large extent a rejection of these theories. The rules were stated by Tindal C.J. in answer to questions put by the House of Lords regarding the defence of insanity. The questions were asked because of publicly expressed fears that in acquitting Daniel M’Naghten, of the murder of the Prime Minister’s secretary, on grounds of insanity the court which tried him had widened the common law insanity defence, and had recognised a defence of irresistible impulse.

The rules are:

the jurors ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and to establish a defence on the ground of insanity it must clearly be proved that, at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.^{22 23}

20 This explanation of human action would not be accepted today. See Chapter 4 for a discussion of consciousness and how it relates to action

21 SMITH, R. 1981. p.96-113. Smith sets out the argument both between different sectors of the medical profession and between the medical profession and the courts

22 M’Naghten’s Case All ER Rep. (1843) 10 C & F 200, 8 Eng Rep 718, [1843-60] All ER Rep 229 at 233. Note that there is considerable variation in the spelling of M’Naghten’s case. For the history of the insanity defence see ROBINSON, D. N. 1996. *Wild Beasts and Idle Humours*, Harvard University Press, and see EIGEN, J.P. 1995

23 Wrong in this sense has been interpreted by the courts as legal wrongness see *R v Windle* [1952] 2QB 826. See MACKAY, R.D. and KEARNS, G. 1999. More Facts about the Insanity Defence. [1999] Crim LR 714-25 for a discussion of whether the courts employ this test of legal wrongness and a suggestion that in fact the courts tend to consider wrongness in this sense as moral wrongness. For a critique of the insanity defence generally see. MACKAY, R.D. 1995, Chapter 2

The M'Naghten Rules became the test of criminal insanity and determine the boundary between insane and non-insane automatism. As will be seen from the following discussion of the case law, those who claim an automatism defence and are deemed by the court to be suffering from an impairment caused by disease of the mind, will receive a verdict of not guilty by reason of insanity rather than an acquittal.²⁴

Notions of free will were also important in Victorian England. Wiener argues that in early Victorian England 'law reform had Evangelical as well as Utilitarian dimensions'. Fifoot notes that the 'utilitarian frame of mind' of the judiciary did not prevent them having an 'itch to moralise'.²⁵ Wiener argues that Victorian law reform saw the law as a vehicle for developing the idea of self restraint.²⁶

The Victorian age was a period of great law reform and it was during this era that the criminal law began to assume the form it has now achieved. Norrie describes the preceding period, the eighteenth century, as a time when 'the bloodiness of the law substantially increased'.²⁷ As a result by the early nineteenth century there was a growing interest in reforming the law to reflect the needs of the new age. Wiener suggests that 'underlying early Victorian reform of criminal policy was the supposition that the most urgent need, and possibility, of the age was to make people self-governing and that the way to do this was to hold them ... responsible for the consequences of their actions'.²⁸ Paralleling the emergence of these concepts were developments in the theory of punishment. Retributivist theories were based upon the notion of the autonomous individual possessing certain rights.

24 In this connection it is necessary to point out that the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 introduced a degree of flexibility into the sentencing of those receiving an insanity verdict

25 FIFOOT, C.S. 1959. *Judge and Jurist in the Reign of Victoria*. London: Stevens. p.55, quoted in WIENER, M. 1994. *Reconstructing the Criminal Law*. Cambridge University Press. p.53

26 WIENER, M. 1994. p.56 develops this argument from Patrick Atiyah's assertion that the Victorian's 'believed in principles of behaviour which if, taken over all, would produce the greatest happiness; but they did not believe that each individual act should be weighed in the balance (at least by the common herd) to decide whether it would promote the greatest happiness or not.' ATIYAH, P.S. 1979. *The Rise and Fall of the Freedom of Contract*. Clarendon. p.354-6

27 NORRIE, A. 1993. p.18

28 WIENER, M. 1994. p.11-12

Kant and Hegel insisted that punishment was a matter first and foremost, of the right of the individual. Because of this, the individual's guilt had to be established in advance of punishment, and, most importantly, punishment had to equal the crime. ...The demand for individual justice was a central demand of liberal thought in this period, and it is crucial to note its theoretical basis in the birth of a particular model of the legal subject as a free and responsible agent.²⁹

In order to hold someone responsible for an individual act the notion developed that the act must be willed or voluntary. This emphasis on free will, and the ideal of a rational individual using self restraint to further his own interests, arose as a response to the old order and its absolutist politics.³⁰ In England, Norrie suggests that the revolution was achieved through Benthamism. 'The key conception was that the social world was founded upon individual self interest and rights ... the core idea ... involved the embrace of free individualism in every discourse, and this provided a firm basis for the criticism and rejection of the old absolutist method of social control through a punitive reign of terror.'³¹

In 1833 Law Commissioners were appointed by the government.³² Hood and Radzinowicz comment:

On reading the Commissioners' reports, one is struck by the affinity between their ideas and those of Cesare Beccaria.³³ They were indeed rather proud to acknowledge their debt to him. Their penal doctrine was, in this sense, an English adaptation of what has been called classicism. They were classicists in their unadulterated belief in free will and the exercise of unfettered choice by individuals in deciding whether or not to

29 NORRIE, A. 1993. p19

30 NORRIE, A. 1993. p.19

31 NORRIE, A. 1993. p.19

32 Their terms of reference were:-

'to digest into One Statute all the Statutes and Enactments touching Crimes and the Trial and Punishment thereof, and also to digest into One other Statute all the Provisions of the common or unwritten Law touching the same, and to inquire and report how far it may be expedient to combine both these Statutes into One Body of the Criminal Law.'

House of Lords Session Papers (1847-48) vol., 41, 224, quoted in HOOD, R. & RADZINOWICZ, L. 1986. *A History of English Criminal Law*, vol. 5. London: Stevens. p.723

33 See BECCARIA, C. 1764. *Dei delitti e delle pene*, trans. PAOLUCCI, H. 1963. *On Crimes and Punishments*. Indianapolis: Bobbs-Merrill

commit crime, or crimes of different gravity.³⁴

Stephen³⁵ in his *History of the Criminal Law vol. II*, says 'The act must be voluntary, and the person who does it must be free from certain forms of compulsion ... The act must be intentional.'³⁶ For Stephen clearly voluntariness and compulsion are to be distinguished, 'there is no opposition between voluntary action and action under compulsion. The opposite to voluntary action is involuntary action, but the very strongest forms of compulsion do not exclude voluntary action ... Freedom is opposed to compulsion as voluntary is to involuntary.'³⁷

Smith suggests that the average Victorian jurymen would have a clear concept of volition. The Victorian layman's understanding of the word came from the fact that

'Victorian' is almost synonymous with 'willpower'; a genre of popular writing exhorted readers to exercise their innate mental power over thoughts and acts.' Responsibility resulted when this power was, or might have been exerted. Individual wills were facts to Victorians: 'Every human creature attaches to the words 'to will,' or their equivalents, as vivid a meaning as every man with eyes attaches to the words 'to see'.³⁸

However it is debatable whether the law in England ever gave the priority to the voluntary act that Smith's comments might suggest. Hart, considering the then Jewish Legal doctrine that an 'exercise of will is necessary for [criminal] responsibility', stated

34 HOOD, R. & RADZINOWICZ, L. 1986. p.727

35 STEPHEN, J.F., was involved in the reform of the criminal law in England in a variety of ways. He was a judge, a Law Commissioner, wrote, inter alia: 1863. *A General View of the Criminal Law of England*. London: MacMillan and Co. 1883 *A History of the Criminal Law of England*. New York: Burt Franklin., 1894. *A Digest of the Criminal Law* (5th edit.). London: MacMillan and Co. and was responsible as a Royal Commissioner for assisting in the preparation of the draft Homicide Law Amendment Bill 1874 and a draft Criminal Code 1879.

36 STEPHEN, J. F. 1883 vol. II, p.97

37 STEPHEN, J. F. 1883 vol. II, p.102.

38 SMITH, R. 1981 p.72-3. Quoting from STEPHEN, J.F. 1863. p.77

English Lawyers though they may admire this bold step cannot use as an escape route from the confines of the McNaghten rules the similar doctrine that for any criminal liability there must be a 'voluntary act' which many authorities have said is a fundamental requirement of English criminal law. For this doctrine has always been understood merely to exclude cases where the muscular movements are involuntary as in sleepwalking or 'automatism' or 'reflex action.'³⁹

Hart traces the root of this doctrine back to John Austin.

Stephen's definition of action is subtly different from Austin's, though still firmly linked to the idea of bodily motion. In his *General View of the Criminal Law of England*, Stephen considered that 'the sensations which accompany every action and distinguish it from mere occurrence are intention and will'. The process of willing was according to Stephen, an essential part of the theory of action and was described by him as 'that inward state which as experience informs us, is always succeeded by motion, whilst the body is in its normal condition.'⁴⁰ It seems from this comment that Stephen saw willing as a psychological item. For Stephen volitions arose from an 'act of choice, which means no more than the comparison of motives. The distinction between this definition and Austin's'⁴¹ is that Stephen's explanation is less reductionist in that it depends upon choice. In Stephen's definition of volition, he avoids some of the problems of describing involuntary action by referring to motion 'whilst the body is in its normal condition.'⁴²

Stephen is quite clear in his definition of voluntary action:

a voluntary action is a motion or a group of motions accompanied or proceeded by volition and directed towards some object. Every such action comprises the following elements - knowledge, motive, choice, volition, intention; and thoughts, feelings and motions adapted to execute the intention. ... Whatever controversies there may be as to the nature of human beings and as to the freedom of will, I do not think that there

39 HART, H.L.A. 1965. *The Morality of the Criminal Law*. Lionel Cohen Lectures Tenth Series - 1964, Oxford University Press. p.5

40 STEPHEN, J.F. 1863. p.76-7. Both quotations

41 See Introduction p.22-5 & 28-30 for a discussion of Austin's explanation

42 STEPHEN, J.F. 1863. p.77

can be any question that this is a substantially correct account of normal voluntary action.⁴³

For Austin criminal liability was tied to the tracing of an action to a voluntary bodily movement. For Stephen action was the result of a choice, volitions must be present in the form of a 'determination to take some particular course' of action. Stephen describes choice as, 'no more than the comparison of motives. Choice leads to the determination to take some particular course and this determination issues in a volition, a kind of crisis of which everyone is conscious but which is impossible to describe otherwise than by naming it'.⁴⁴ Stephen's account is mainly practical and attempts to avoid philosophical problems by avoiding the controversy regarding the 'nature of human beings' and 'freedom of will'. However, these problems have remained elements in the juristic debate of voluntary actions until the present day. A further problem which is not resolved by either Stephen or Austin is the problem of distinguishing involuntary from habitual action.

Twentieth Century Case Law

In examining the case law of England and Wales it is proposed to evaluate cases in which automatism is claimed to avoid liability from road traffic offences separately from other cases in which automatism is claimed because of the rigid definition attributed to the word 'driving' by the courts in England and Wales.

It is proposed first to look at those cases which do not involve driving offences and to start by examining the case of *R v Charlson*.⁴⁵ Evidence at the trial suggested that Charlson might have been suffering from a cerebral tumour, a condition which might be manifested by sudden motiveless violence. He had made a violent attack on his son which seemed to be unprovoked. In his statement to the police, Charlson admitted that he had attacked his son but said he did not know why. Charlson was charged on three counts: firstly grievous bodily harm with intent

43 STEPHEN, J.F. 1883 vol. II, p.100-1

44 STEPHEN, J.F. 1883 vol. II, p.100

45 [1955] 1 WLR 317

to murder his son, secondly causing grievous bodily harm, and thirdly ‘inflicting grievous bodily harm without “any specific allegation as to his intention”’⁴⁶.

Barry J. instructed the jury regarding consciousness, firstly pointing out that accidental acts do not attract criminal liability:

For example, an act that otherwise might be an assault would not be an assault, if it were done purely accidentally. You or I in a public street might suddenly put our hands up to stop our hat being blown off and hit a passer-by on the nose without knowing he was there. If we had consciously put out our hands, whatever the motive, to hit the passer-by on the nose, it would be an assault; but it would have to be a conscious act. If it were purely accidental, no assault would be committed; the element of consciousness would not be present.⁴⁷

and with relation to action where control of bodily movement is affected by disease, Barry J. used the example of an epileptic fit:

Similarly in the case of certain diseases, a person suffering from a disease may be deprived of the control of his actions. We all of us know something about the effects of epilepsy and the actions of a man who is suffering at any given moment from an epileptic fit. A man in the throes of an epileptic fit does not know what he is doing. Thus if a friend bends over to assist the epileptic and in the midst of his fit the latter grips that friend by the throat, not knowing what he is doing, and in so doing throttles him and causes his death no offence has been committed against the criminal law; because the actions of an epileptic are automatic and unconscious, and his will and his consciousness are not applied to what he is doing; he is not in control of his actions.⁴⁸

With regard to the defence of automatism, Barry J. instructed the jury to ask themselves whether the accused ‘knowingly’ struck his son:

If you are left in any doubt about the matter and you think that he may well be acting as an automaton without any real knowledge of what he was doing, then the proper verdict would be ‘not guilty’, even on the third and least serious of these alternative

46 [1955] 1 WLR 317, 318

47 [1955] 1 WLR 317, 319-320

48 [1955] 1 WLR 317, 320

charges.⁴⁹

Following this instruction the jury returned a verdict of not guilty on all three counts.

Charlson's case is of interest, as Barry J.'s view of the defence differs profoundly from that set out in subsequent case law. If Barry J.'s judgment was an accurate reflection of the case law when *Charlson's* case was heard the subsequent judgments have significantly narrowed the defence of non-insane automatism. As will be seen the reasons for the narrowing of the defence relate directly to policy issues concerning the insanity defence and the disposal of dangerous defendants.

A different view of automatism was taken by Devlin J. in the case of *R v Kemp*⁵⁰ where a husband had made an unprovoked attack on his wife with a hammer and was charged with causing grievous bodily harm to his wife. It was accepted that he was suffering from arteriosclerosis at the time of the attack which had caused him to lose consciousness and that it was the effect of this loss of consciousness which had caused him to attack his wife. The court found that *Kemp's* case could be distinguished from *Charlson's* because those giving medical evidence in *Kemp's* case were not in agreement.

Devlin J. instructed the jury that the evidence in the case pointed to insanity not automatism. *Kemp's* counsel argued that the arteriosclerosis was not yet so far advanced as to constitute a disease of the mind. Devlin J. rejected this argument:

The main object, in my judgment, was that it should be decided whether there was a defect of reason which had been caused by a disease affecting the mind; if it were so decided, then there would be insanity within the meaning of the rule in *M'Naghten's Case*. The hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning and understanding, and is thus a disease of the mind within the meaning of the rule. I shall therefore direct the jury that it matters not whether they accept the medical evidence of the prosecution or the defence, but that on the whole of the medical evidence they ought to find that there is a disease of the

49 [1955] 1 WLR 317, 321-322

50 [1956] 3 All ER 249

mind within the meaning of the rule.⁵¹

Temporary or permanent insanity satisfied the M’Naghten rules. Following this ruling the jury found that Kemp was insane at the time of the offence. Mackay points out that by this ‘wide definition of what constitutes a “disease of the mind” within the M’Naghten Rules, his Lordship was able to ensure that the only defence available to the accused was one of insanity, thus avoiding the result reached in *Charlson*, namely an unqualified acquittal.’⁵²

The cases of *Kemp* and *Charlson* are first instance cases decided on similar facts but with very different consequences for the accused. The stance taken by Devlin J. in *Kemp* was confirmed by the House of Lords in *Bratty v Attorney General for Northern Ireland*⁵³ and the approach in *Charlson* was questioned, particularly Barry J.’s direction to the jury ‘that insanity did not come into the case’.⁵⁴ This argument that insanity was not relevant was contestable on the legal definition of insane automatism given in *Bratty*, since Charlson’s condition was one which might lead to sudden motiveless violence.⁵⁵

Bratty murdered a woman, and claimed, inter alia, that when he committed the murder he was in a state of automatism. Once the jury had rejected the defendant’s insanity plea, the judge at first instance refused to put the defences of either automatism or diminished responsibility to the jury. The House of Lords considered two issues. The first was whether his plea of insanity having been rejected, the accused could rely on an automatism defence and the second was if

51 [1956] 3 All ER 249, 253

52 MACKAY, R.D. 1995. p.36

53 [1963] AC 386

54 [1963] AC 386, 408 (Viscount Kilmuir)

55 As Lord Denning pointed out:

‘But in *Charlson’s* case [1955] 1 WLR, 317, Barry J. seems to have assumed that other diseases such as epilepsy or cerebral tumour are not diseases of the mind, even when they are such as to manifest themselves in violence. I do not agree with this. It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.’

[1963] AC 386, 412

the answer to the first question was in the affirmative, whether in Bratty's case there was sufficient evidence to be put to the jury.⁵⁶ The first part of this argument was rejected both by the Court of Appeal and the House of Lords, because in the opinion of both courts the automatism defence was based upon evidence of a defect of reason caused by disease of the mind. Thus it was argued that when the jury rejected Bratty's insanity plea they also rejected the automatism defence because both defences rested on the same issues, the medical evidence in the case relating only to insanity. With regard to the evidence necessary for the defence of automatism:

It is necessary that a proper foundation be laid before a judge can leave 'automatism' to the jury. That foundation in my view, is not forthcoming merely from unaccepted evidence of a defect of reason from disease of the mind. There would need to be other evidence on which a jury could find non-insane automatism.⁵⁷

Lord Denning supported the comments made by the Lord Chief Justice, Viscount Kilmuir, regarding claims of automatism based on insanity and made the following policy statement: 'It seems to me that any mental disorder which has manifested itself in violence and is prone to recur, is a disease of the mind.'⁵⁸ Lord Denning supported this assertion by the following reasoning:

Suppose a crime is committed by a man in a state of automatism or clouded consciousness due to a recurrent disease of the mind. Such an act is no doubt

56 According to Viscount Kilmuir the argument advanced on behalf of the appellant was as follows:

'1. The ultimate burden on the Crown is to prove that the crime was a conscious and voluntary act. 2. There was a volume of evidence showing that the act was not conscious and voluntary. 3. The jury should be told to examine this evidence with a view to answering the following questions: A. Are you satisfied that the acts resulting in the death were involuntary or unconscious conduct? B. If this is so, you must go on to consider whether this was due to a defect of reason from disease of the mind of such a kind that the defendant did not know the nature and quality of his act, in which case the form of acquittal would be guilty of the acts charged but insane at the time. C. If you are satisfied that the acts were not conscious and voluntary, but not satisfied that they are due to a defect of reason from disease of the mind, then the verdict should be not guilty because the prosecution have failed to satisfy you that the acts were conscious and voluntary. D. If you are left in doubt as to whether the acts were conscious or voluntary then, if the acts were not within the M'Naughten Rules, the proper verdict would still be not guilty.'

[1963] AC 386, 402

57 [1963] AC 386, 405 (Viscount Kilmuir)

58 [1963] AC 386, 412

involuntary, but it does not give rise to an unqualified acquittal, for that would mean that he would be let at large to do it again. The only proper verdict is one which ensures that the person who suffers from the disease is kept secure in a hospital so as not to be a danger to himself or others. That is a verdict of guilty but insane.⁵⁹

Viscount Kilmuir, Lord Denning and Lord Morris of Borth-y-Gest were of the opinion that dependent on the facts of the case a defence of automatism might exist if a defendant could provide evidence of sleepwalking⁶⁰ during the commission of the criminal act. Lord Denning also made reference to concussion as a cause of automatism.⁶¹

Burden of proof

On the question of what evidence was required to found a defence of automatism Lord Denning stated:

Whilst the ultimate burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the Crown is entitled to rely on the *presumption* that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may be reasonably inferred.⁶²

Thus the law, following *Bratty*, required that a defendant who wished to raise the issue of sane automatism should provide some evidence which would support the automatism defence. Such evidence will not always be easy to provide. The defendant may commit the alleged offence without witnesses being present and any medical evidence produced in court is likely to be the result of an examination of the accused some time after the alleged involuntary action took place. The Court of Appeal made the following disparaging remarks about medical evidence in the case of *David Peter Stripp*,

59 [1963] AC 386, 410

60 [1963] AC 386, 403 (Viscount Kilmuir), 414 (Lord Denning) and 415 (Lord Morris of Borth-y-Gest)

61 [1963] AC 386, 414

62 [1963] AC 386, 413. Emphasis in original

The defence called a Dr. Stamp, who is a registrar in psychological medicine at Kings College Hospital. He did not examine the appellant until some two months or so after the events and the appellant in fact had been referred to him for investigation of what he called an amnesiac episode. He gave the best evidence that he could, entirely hypothetically based. It is not very easy to know quite what Dr. Stamp was saying. He was talking about concussion in a very general way, saying that some people concussed very easily and others were quite resistant. His evidence was inevitably unspecific and not particularly helpful.⁶³

In his judgment Ormrod L.J. considered the burden of proof imposed on a defendant who asserts a defence of automatism,⁶⁴ and adopted Lord Denning's reasoning in *Bratty* quoted above. Needless to say Stripp's appeal was not successful.

An additional complication is the fact that the evidence required to found an insanity defence differs from other defences.⁶⁵ Therefore, there is a distinction between the burden of proof in non-insane and insane automatism. Non-insane automatism as defined in *Bratty* and subsequently applied by the courts requires the raising of some evidence on which an automatism defence may be founded. The insanity defence at common law requires the defendant to establish insanity on the balance of probabilities. Devlin J. acknowledged this in *Hill v Baxter*: '[a]s automatism is akin to insanity in law there would be great practical advantage if the burden of proof were the same in both cases. But so far insanity is the only matter of defence in which under common law the burden of proof has been held to be completely shifted.'⁶⁶ Lord Hope discussed this distinction in *R v Director of Public Prosecutions, ex parte Kebilene and others* and said: '[t]he judges throughout the United Kingdom have resisted the temptation to extend that exemption to the defence of automatism'.⁶⁷

This then leaves the two branches of the automatism defence in the peculiar position of

63 (1978) 69 Cr App R 318, 323

64 (1978) 69 Cr App R 318, 321

65 *Woolmington v. DPP* [1935] AC 462

66 [1957] 2 WLR 76, 82

67 [1999] 3 WLR 973, 990. The discussion in the House of Lords of automatism is arguably obiter

attracting differing evidential standards at common law. Jones considers this and comments '[t]hus the placement of the burden depends upon the distinction which the law recognises between sane and insane automatism.' He concludes that the 'courts have not drawn the necessary distinction with any degree of subtlety.'⁶⁸ In English law this results from the wide definition given to disease of the mind by Devlin J. in *Kemp* and its confirmation in *Bratty*. This has led judges in some trials to instruct juries to consider an insanity verdict when a plea of non-insane automatism has been raised. This in turn has caused some defendants, whose defence of automatism has been limited to a defence of insane automatism by the judge presiding at the trial, changing their plea to guilty to avoid an insanity verdict.⁶⁹

The internal/external focus to distinguish between cases of insane and non-insane automatism

On occasions the courts have attempted to escape from the confines of an insane automatism verdict in an attempt to avoid a verdict which was felt by the court to be inappropriate. In *R v Quick and R v Paddison*⁷⁰ this was achieved by making the legally identified cause of the automatism central to determining whether the automatism claimed is insane or non-insane automatism. The court stated that the type of automatism is dependent upon whether it is an internal or external trigger which causes the automatism. If the cause is internal, the resulting automatism is insane automatism. If the cause is external, the resultant automatism is of the non-insane variety. This approach has caused some difficulties as will be seen as the English case law is examined in some detail.

In *Quick*, the appellant, a nurse at a mental hospital, contested the ruling of the judge at first instance that the only defence open to him was insanity. The Court of Appeal had to consider whether a hypoglycaemic episode which resulted in an assault on a patient could form the

68 JONES, T.H. 1995. *Insanity, Automatism and The Burden of Proof on the Accused* (1995) 111 *LQR* 475-516. Both quotations p.497-8

69 In two of these cases, *R v Quick* and *R v Sullivan*, the accused subsequently appealed against sentence in a bid to overturn the ruling of the judge at first instance that the only defence available to them was insanity

70 [1973] 3 WLR 26. Hereinafter referred to as *R v Quick* or *Quick*

basis of an non-insane automatism defence. The court noted that Quick's own behaviour that day could have caused the fall in blood sugar. As on the morning of the attack, following his taking of insulin, Quick had drunk alcohol but consumed very little food.⁷¹ However, the court was of the opinion that Quick's defence should at least have been tested and Lawton L.J. giving the judgment of the court said:

In this case Quick's alleged mental condition, if it ever existed, was not caused by his diabetes but by his use of the insulin prescribed by his doctor. Such malfunctioning of his mind as there was, was caused by an external factor and not by a bodily disorder in the nature of a disease which disturbed the working of his mind. It follows in our judgment that Quick was entitled to have his defence of automatism left to the jury and that Bridge J.'s ruling as to the effect of the medical evidence called by him was wrong. Had the defence of automatism been left to the jury, a number of questions in fact would have had to be answered. If he was in a confused mental condition, was it due to a hypoglycaemic episode or to too much alcohol? If the former, to what extent had he brought about his condition by not following his doctor's instructions about taking regular meals? Did he know that he was getting into a hypoglycaemic episode? If yes, why did he not use the antidote of eating a lump of sugar as he had been advised to? On the evidence which was before the jury Quick might have had difficulty in answering these questions in a manner which would have relieved him of responsibility for his acts. We cannot say, however, with the requisite degree of confidence, that the jury would have convicted him. It follows that his conviction must be quashed on the ground that the verdict was unsatisfactory.⁷²

Emphasis was placed in *Quick* on establishing the culpability of the defendant by focussing the jury's attention upon his conduct leading up to the hypoglycaemic episode. This emphasis has to be welcome. However, the use of an external/internal distinction to clarify the distinction between insane and non-insane automatism which continues to be used by the courts has caused difficulty and led to criticisms of judicial decisions.

What made the external/internal distinction even harder to maintain is the Court of Appeal's subsequent application of *Quick* in *R v Hennessy*.⁷³ As a result of this judgment diabetics are only able to plead non-insane automatism when they suffered one type of diabetic episode a

71 [1973] 3 WLR 26, 29

72 [1973] 3 WLR 26, 35-6.

73 [1989] 1 WLR 287

hypoglycaemic one, which had an external cause. The other type of diabetic episode, a hyperglycaemic episode, has been stated by the judiciary to have an internal cause, because it has to do with the regulation by the body of blood sugar levels, and thus gives rise to an insane automatism plea. Such an arbitrary distinction seems unjust.⁷⁴

In *Hennessy* the court had to consider the case of a diabetic who, because he was suffering from 'stress, anxiety and depression' failed to take his proper dose of insulin, and then stole a car. Hennessy claimed he did not know what he was doing. The reason he gave was that he was suffering a hyperglycaemic reaction at the time of the criminal offence. The court of first instance, and the Court of Appeal held the defence to be one of insane automatism. The reasons given by the Court of Appeal were that 'in Quick's case the fact that his condition was, or may have been due to the injections of insulin' which 'meant that the malfunction was due to an external factor and not to the disease' gave him the right to a defence of non-insane automatism. Whereas in Hennessy's case 'hyperglycaemia, high blood sugar, caused by an inherent defect, and not corrected by insulin is a disease'⁷⁵ and therefore if automatism was claimed, the defence would have to be considered under the M'Naghten Rules.

In answer to the defence argument that the 'appellant's marital troubles and depression' were a 'sufficiently potent external factor' to explain the diabetic episode Lord Lane said:

In our judgment, stress, anxiety and depression can no doubt be the result of the operation of external factors, but they are not, it seems to us, in themselves separately or together external factors of the kind capable in law of causing or contributing to a state of automatism. They constitute a state of mind which is prone to recur. They lack the feature of novelty or accident, which is the basis of the distinction drawn by Lord Diplock in *Reg. v. Sullivan* [1984] A.C. 156, 172. It is contrary to the observations of Devlin J., to which we have just referred in *Hill v. Baxter* [1958] 1 Q.B. 277, 285. It does not, in our judgment, come within the scope of the exception of some external physical factor such as a blow on the head or the administration of an anaesthetic.⁷⁶

74 For a full analysis of the internal/external distinction see MACKAY, R.D. 1995. p.36-51

75 [1989] 1 WLR 287. All quotations 293

76 [1989] 1 WLR 287, 294

The approach taken to diabetics by the courts has from its inception led to adverse medical commentary, particularly as it is not only diabetics who are affected by the decision. Those who are otherwise physically well might suffer from one of these two conditions. In the discussion of automatism following the House of Lords' decision in *R v Sullivan*⁷⁷ the point was made that '[t]he distinction between inherent and intrinsic causes is arbitrary and has no medical significance - the logic is not enhanced by the knowledge that epileptic seizures can be precipitated by hyperglycaemia or hypoglycaemia even in a person otherwise well'.⁷⁸ Indeed in *Toner*⁷⁹ the possibility of an automatism defence based on a mild hypoglycaemic episode, following the ingestion of food after a period of fasting, was considered by the Court of Appeal. The court concluded that a defence to a criminal charge based on such a claim was a possibility and therefore the medical evidence which might have supported such a claim ought to have been heard by the jury. Accordingly the case was remitted for a retrial.

If the decision in *Toner* is contrasted with that in *Hennessy*, there seems to be something arbitrary in the internal/external test in the automatism defence. Why should a defendant who fasts possibly because of stress, and following eating commits a criminal act have the possibility of a defence of non-insane automatism: whereas, a diabetic, who as a result of stress fails to take insulin and then commits a crime during a hyperglycaemic episode, if she is to plead automatism, must plead insane automatism?

Epilepsy is another condition which has been held to have an internal trigger and to be a 'disease of the mind' and therefore an automatism defence which utilises medical evidence of epilepsy results in an insanity verdict. In *Sullivan*, the House of Lords held that an epileptic, who seriously assaulted an elderly acquaintance when in a state of automatism following an epileptic fit, could only plead insane automatism. In view of the possibility of an insanity verdict, Sullivan had previously accepted the opportunity to change his plea to guilty and subsequently appealed against the first instance judge's ruling which had deprived the jury of

77 [1983] 2 All ER 673

78 ROYAL SOCIETY OF MEDICINE. 1985. *Epilepsy and the Law a Medical Symposium on the Current Law*: International Conference and Symposium Series no. 81, Oxford University Press, p.52

79 John Toner (1991) 93 Cr App R 382

the opportunity to consider his automatism defence, and had meant the only plea available to him was insanity. The House of Lords said that what was important was that the effect of epilepsy was to impair the faculties of 'reason, memory and understanding'.⁸⁰ These faculties were affected in a manner which meant that the M'Naghten Rules⁸¹ applied, that is either Sullivan 'was labouring under a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it he did not know he was doing what was wrong.'⁸² The only defence available to the defendant was insane automatism. Lord Diplock stated 'it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of the commission of the act.'⁸³

Sullivan's counsel had argued that his condition was one of functional impairment and therefore Sullivan's defence should be automatism not insanity. He explained the argument as follows:

First were the House of Lords constrained to apply the McNaghten Rules? I believe that they were not, but it did not get me anywhere. We wanted to argue for Sullivan that the McNaghten Rules did not apply, because they refer to a man knowing the nature and quality of his act, and this presupposes the exercise of some function of the mind. We wished to argue that the McNaghten Rules do not operate in the case of hypoglycaemia or of an epilepsy (sic) because, for practical purposes, there is no exercise of the mind function, as the law recognizes it. ...

our fundamental premise for Mr Sullivan was that the law recognizes an act as being a muscular contraction consequent upon determination of the will and that the law has never recognized any movement as an act unless there is that fundamental premise.

The next stage, we argued, was that where there is no will in the ordinary sense the McNaghten Rules do not apply. We were content that the McNaghten Rules should define insanity as the prosecution so defined it - but the House of Lords would not have it. They replied that they did not require argument from us as to whether or not

80 [1983] 2 All ER 673, 677

81 [1843-60] All ER Rep 229, 233. For a full review of the insanity defence and the problems created by the M'Naghten Rules. See MACKAY, R.D. 1995. Chapter 2

82 All ER Reprint [1843-60] 220, 233

83 [1983] 2 All ER 673, 677

the McNaghten Rules applied. The House went on to rule that the McNaghten Rules are the comprehensive definition of insanity in this branch of the law.⁸⁴

Again the reason for the decision in *Sullivan* is related by the court to the policy of protecting 'society against recurrence of the dangerous conduct.' This was a concern however brief the period of automatism might be: '[t]he duration of a temporary suspension of the mental faculties of reason, memory and understanding, particularly if, as in the appellant's case, it is recurrent cannot on any rational grounds be relevant to the application by the courts of the M'Naghten Rules,' though such considerations might be relevant to the Secretary of State when considering the appropriate sentence for such an offender. Lord Diplock admitted that it was 'natural to feel reluctance to attach the label of insanity to a sufferer from psychomotor epilepsy' but nonetheless the court did not have it within its power to change the law. 'Only Parliament can do that. It has done so twice; it could do so once again'.⁸⁵

Criticisms of Sullivan

Following the House of Lords' decision in *Sullivan* a medical symposium was held to discuss the problems it created.⁸⁶ Lionel Swift QC, Sullivan's barrister, acknowledged that the present law had the advantage of permitting the detention of those who were dangerous, but identified the following disadvantages:

The disadvantages, however, are many. I will mention just two: first, the compulsory order to commit a person to a mental hospital may be ill-advised, unnecessary and wasteful, both for that person and society as a whole. The second major disadvantage lies in the practical and emotional consequences of the verdict, *not guilty by reason of insanity*. How far that is a realistic practical consequence is a matter for you. Epileptics, for example, must in any event in various aspects of their everyday life declare that they are epileptics.⁸⁷

84 ROYAL SOCIETY OF MEDICINE. 1985. p.28

85 [1983] 2 All ER 673. All quotations 678

86 ROYAL SOCIETY OF MEDICINE. 1985. Records this discussion

87 ROYAL SOCIETY OF MEDICINE. 1985. p.12. Emphasis in original

It should be noted that the practical consequences of an insanity verdict have been to some extent mitigated by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, which amended section 5 of The Criminal Procedure (Insanity) Act 1964 and provides a wider range of disposal options for those found to be not guilty by reason of insanity by the courts.⁸⁸ However, the stigma attached to an insanity verdict still remains. Perhaps the problem is expressed most poignantly by Sullivan himself as reported to the conference by Dr. Taylor:

We told him that the judge was prepared to consider him not guilty because of insanity. 'But I'm not insane,' said PS. We advised him, because of the consequences of this to plead guilty. 'But I'm not guilty,' said PS. Even the eloquent counsel paused, then PS spoke again: 'But you're three intelligent, educated people - I'll do what you say.'⁸⁹

Dr. Taylor highlights the difference in the approach adopted by the courts and the medical profession: 'the law and medicine, are systems in parallel. They work side by side but with quite independent definitions of the problems and often differing concepts of what may be in the best interests of the client, let alone what may be in the best interests of the public affected by his behaviour.'⁹⁰

88 CRIMINAL PROCEDURE (INSANITY) ACT 1964

5. Powers to deal with persons not guilty by reason of insanity or unfit to plead etc

(1) This section applies where -

- (a) a special verdict is returned that the accused is not guilty by reason of insanity; or
- (b) findings are recorded that the accused is under a disability and that he did the act or made the omission charged against him.

(2) Subject to subsection (3) below, the court shall either -

- (a) make an order that the accused be admitted, in accordance with the provisions of Schedule 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, to such hospital as may be specified by the Secretary of State; or
- (b) where they have the power to do so by virtue of section 5 of that Act, make in respect of the accused such one of the following orders as they think most suitable in all the circumstances of the case, namely—
 - (i) a guardianship order within the meaning of the Mental Health Act 1983; (ii) a supervision and treatment order within the meaning of Schedule 2 to the said Act of 1991; and (iii) an order for his absolute discharge.

(3) Paragraph (b) of subsection (2) above shall not apply where the offence to which the special verdict or findings relate is an offence the sentence for which is fixed by law.

89 ROYAL SOCIETY OF MEDICINE. 1985. p.15

90 ROYAL SOCIETY OF MEDICINE. 1985. p.16

The problem of defining disease of the mind was the subject of considerable debate at the symposium.⁹¹ In his summary of the discussion Fenwick stated that ‘the concept of mind is so abstract that it should be dealt with by philosophers’.⁹² Earlier in the discussion Dr. Howard considered the role played by the words ‘disease of the mind’ in explanations of automatism and concluded that it:

is being asked to play a part in four very different types of discourse.

- (1) in explaining how an action comes to be performed;
- (2) in ascription of responsibility, both for the state of mind and for the action;
- (3) in the prevention of recurrence; and
- (4) in terms of psychiatric diagnosis or formulation.⁹³

This statement by Dr. Howard highlights a very real problem for the law in identifying how to define the mental states which may be excused on the grounds of automatism. It also raises the question of whether the law can employ a definition of automatism which accords with a medical definition of automatic states. In the forum discussion Dr. MacKeith supplies one answer to this question: ‘I would like to support the argument that disease of the mind as a legal concept, and disease as a medical concept are, and always will be, two entirely separate things. The law must reflect what public opinion accepts and what it will tolerate.’⁹⁴ So, once again social policy issues are seen as being of paramount importance in this area of law.

One of the issues that was covered by the symposium was the transient nature of Sullivan’s affliction and whether as such it could merit an insanity verdict. Particularly when research evidence suggested that the risk of a crime being committed by an epileptic, particularly a violent crime, was very low.⁹⁵ The transient nature of automatism and the problems this causes

91 ROYAL SOCIETY OF MEDICINE. 1985. p.23-36

92 ROYAL SOCIETY OF MEDICINE. 1985. p. 41. For a discussion of consciousness and the problems of defining mind see Chapters 4 & 5

93 ROYAL SOCIETY OF MEDICINE. 1985. p.36 The problem of defining involuntary action has also been subject to similar comment see discussion of Fitzgerald’s comments see Introduction p.21

94 ROYAL SOCIETY OF MEDICINE. 1985. p.24

95 ROYAL SOCIETY OF MEDICINE. 1985. Dr. Taylor, p.19

(continued...)

for the courts in sentencing was discussed by Lawton L.J. in *Quick* 'The difficulty arises as soon as the question is asked whether he should be detained in a mental hospital. No mental hospital would admit a diabetic simply because he had a low blood sugar reaction'.⁹⁶

Sleepwalking

If problems had arisen for the courts in deciding whether diabetics or epileptics could be allowed to plead non-insane automatism, the defence became even narrower following the pleading of sleepwalking by *R v Burgess*.⁹⁷ Burgess appealed to the Court of Appeal against the verdict of not guilty by reason of insanity, the result of the trial judge's ruling that only insane automatism could be considered by the jury regarding his defence of non-insane automatism caused by sleepwalking. In earlier automatism cases obiter discussion had taken place regarding criminal responsibility for the actions of a sleepwalker,⁹⁸ which was often seen as the paradigm case of acting purposively but without conscious control of bodily movements.

95 (...continued)

'McDonald (1969) found only two examples of crimes committed as a result of epileptic seizure in a series of 1000. Since 1889 there have been only 15 cases in the whole of the United States in which epilepsy has been used as a defence against violent or disorderly conduct (Delgado-Escueta et al 1981). In a survey of all male epileptics in some form of custodial care in Britain in 1967 only one man was found in the entire prison or borstal population who had probably offended during an epileptic attack (Gunn 1978: Gunn and Fenton 1971) and only two among 38 epileptics in one Special Hospital, Broadmoor (Gunn and Fenton 1971). Taking a wider view to try and develop an impression of the risk of becoming one of this select group, a small number of studies have examined rates of automatic behaviour among epileptics. The most relevant here, because it examines an out-patient sample, is that of Knox (1968). He reviewed 434 epileptics attending one clinic. He found that 43 (10 per cent) of the cases showed some form of automatic behaviour in relation to a fit but only one subject who had acted violently in this context. This does not of course imply that even as many as 10 per cent of all epileptics are at risk from automatic behaviour. Epileptics attending hospital clinics might be expected to have a lower rate of such complications than those few patients in an epileptic colony or a mental hospital, but it is likely that they would show a higher rate than other epileptics in the community. The College of General Practitioners Report (1960) showed that at most 75 per cent of epileptics in the community saw hospital consultants.'

96 [1973] 3 WLR 27, 31

97 *R v Burgess* [1991] 2 All ER 769. For a discussion of the case see MACKAY, I. 1992. The Sleepwalker is Not Insane. (1992) 55 (5) *MLR* 714-20

98 See Lord Denning's discussion of sleepwalking in *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 414

However in *Burgess* the court considered that the defendant's behaviour amounted to insane rather than non-insane automatism. Burgess hit a female friend over the head with a bottle and a video recorder while she was sleeping, a series of acts which he claimed were committed whilst he was sleepwalking. Lord Lane made reference to the fact that: '[t]here have been several occasions when during the course of judgments in the Court of Appeal and the House of Lords observations have been made, obiter, about the criminal responsibility of sleep walkers, where sleep walking has been used as a self-evident illustration of non-insane automatism'.⁹⁹ Lord Lane considered the evidence of both defence and prosecution which he summarised as follows:

His case was that he lacked the mens rea necessary to make him guilty of the offence, because he was 'sleep walking' when he attacked Miss Curtis. He was, it was alleged, suffering from 'non-insane' automatism and he called medical evidence, in particular from Dr. D'Orban and Dr. Eames to support that contention.

The prosecution on the other hand contended that this was not a case of automatism at all, but that the appellant was conscious of what he was doing. If, contrary to that contention, he was not conscious of what he was doing, then the case fell within the M'Naghten Rules (see *M'Naghten's Case* (1843) 10 Cl. & Fin. 200), and accordingly the verdict should be not guilty by reason of insanity.¹⁰⁰

Lord Lane referred to the Canadian case of *R v Parks*¹⁰¹ where the defendant successfully pleaded automatism as a defence to a charge of murder. The Canadian court accepted that sleepwalking was not a 'disease of the mind', but a 'natural, normal condition - sleep'¹⁰².

According to Lord Lane two matters must be considered when the defence of automatism was raised: '[t]he first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, ... or non-insane automatism.'¹⁰³ On the latter question Lord Lane considered the evidence of the medical experts in the case. The medical evidence for the defence, from Dr. D'Orban,

⁹⁹ *R v Burgess* [1991] 2 All ER 769, 774

¹⁰⁰ [1991] 2 All ER 769, 771

¹⁰¹ (1990) 56 CCC (3d) 449. Ontario Court of Appeal

¹⁰² (1990) 56 CCC (3d) 449, 465-66. Quoted in *R v Burgess* [1991] 2 All ER 770, 775

¹⁰³ [1991] 2 All ER 769, 771

suggested that the defendant's sleep disorder, was caused by an internal factor and was 'liable to recur'.¹⁰⁴ The other defence witness, Dr. Eames, agreed with Dr. D'Orban.

The prosecution expert, Fenwick, argued that if Burgess was unconscious of what he was doing at the time of the attack on Miss Curtis he was not sleepwalking but in a 'hysterical dissociative state'.¹⁰⁵ Having considered this evidence and Fenwick's comments regarding violent acts in sleep - '[s]erious violence does recur, or certainly the propensity for it to recur is there, although there are very few cases in the literature - in fact I know of none - in which somebody has come to court twice for a sleepwalking offence.'¹⁰⁶ Lord Lane concluded that:

on this evidence the judge was right to conclude that this was an abnormality, albeit transitory, due to an internal factor, whether functional or organic, which had manifested itself in violence. It was a disorder or abnormality which might recur, though the possibility of it recurring in the form of serious violence was unlikely.¹⁰⁷

The legal principles were as the trial judge had found them to be. Although sleepwalking has traditionally been cited as the paradigm case of automatism its acceptance as such in law was made more difficult by the defence expert's statement that the cause of the disorder was internal, and by the rejection by the court of the argument in *Parks* that the defendant's acts resulted from a 'natural normal condition - sleep'. Lord Lane was of the opinion that the evidence indicated that 'sleepwalking particularly violence in sleep is not normal'.¹⁰⁸ Once again the policy behind the insanity defence played a part. 'It seems to us that if there is a danger of recurrence that may be an added reason for categorising the condition as a disease of the mind.'¹⁰⁹ To a layman the classification of sleepwalking as a disease of the mind may seem absurd. Part of the problem with this classification is that such a defence may well be received sympathetically by both medical personnel and juries who have had experience of similar

104 [1991] 2 All ER 769, 775

105 [1991] 2 All ER 769, 775

106 [1991] 2 All ER 769, 776 as summarised by Lord Lane

107 [1991] 2 All ER 769, 776

108 [1991] 2 All ER 769, 775

109 [1991] 2 All ER 769, 774

events.

In May 1986, Colin Kemp was acquitted of murder at the Old Bailey when the jury accepted his explanation that he had killed whilst asleep and fighting for his life against Japanese soldiers. 'Later it was revealed that during the five day trial dozens of people had written to court describing their own very real nightmares and the fears they had.'¹¹⁰ The reports in the press reveal that evidence heard by the court was very different in quality from that reviewed by Lord Lane in *Burgess*.

In Colin Kemp's case the *Sunday Times*¹¹¹ reported

Professor Ian Oswald a psychiatrist at Edinburgh University who recently wrote a paper about night terror — in which a nightmare moves into physical action — cites it as a form of behaviour 'as old as mankind'.

'Acquittals like this have been going on for hundreds of years,' he said yesterday. The first recorded in Britain was in the 1600s when a soldier in the grip of night terror killed his colonel. He was cleared on the grounds that when a man is asleep he cannot form the intent essential, to a conviction.

The *Daily Telegraph*¹¹² reported that one of the medical experts 'Dr. Tony Whitehead a consultant at Bevendean Hospital, Brighton said yesterday he even had a slightly similar experience himself when he knocked a nurse across the room.' Dr. Paul D'Orban, who is presumably the same medical expert as gave evidence in defence of Burgess, said of night terror which was the condition from which Kemp was suffering '[i]n a third of cases it involved sleep walking or some other action. In some cases it involved injury to others or self-injury.'¹¹³ Interestingly though the *Sunday Times* states "Women's groups" yesterday

110 *Guardian* 3rd May 1986 p. 3

111 4th May 1986, p.9

112 *Daily Telegraph* 3rd May 1986 p.3

113 *Daily Telegraph* 3rd May 1986 p.3

described it as a “charter to kill”.¹¹⁴ There is no reference in the press reporting of the case to any consideration in court of the insanity defence or of the policy considerations relating to dangerous behaviour. In many ways this case seems an unreported aberration, although it did receive wide press coverage at the time and was the subject of an article in *New Law Journal* which pointed out its inconsistencies with the House of Lords’ decision in *Sullivan*.¹¹⁵

However, given the obiter statements made regarding sleepwalking in other cases it could be seen as an interpretation by the Central Criminal Court of sleep as being a natural condition and not a disease of the mind. Alternatively, it could have been the decision of a sympathetic jury. As it is unreported it is impossible to say what the basis for the decision might have been. *Burgess*, the decision of the superior court, remains the leading case, and therefore, on this basis, it would seem extremely difficult for any defendant to argue sleepwalking as a non-insane automatism defence.¹¹⁶

Cases where automatism has been used as a defence to driving offences.

In the driving cases it has been held that the destruction of voluntariness has to be total for the defence of automatism to be put to the jury. The approach taken by the courts to driving offences generally is arguably stricter than in the case of other offences.¹¹⁷ To this extent it is possible to distinguish two approaches adopted by the courts to the defence of automatism. In driving cases once the defendant may be said to be driving the defence of automatism is unlikely to be available. If the accused is in some way driving, that is she has some, albeit limited, control over the vehicle then she is still driving the vehicle and cannot claim non-insane automatism. This was confirmed by the Court of Appeal in *Attorney General’s Reference (No*

114 4th May 1986 p.9

115 WELLER, P. I. 1987. Perchance to Dream. (1987) 137 (6288) *NLJ* 52. See also a case of burglary whilst sleepwalking *R v Dennehy* (unreported), where the CPS accepted medical evidence that it was a ‘classic case of automatism’ and offered no evidence. McCONNELL, B. Sleep, perchance to dream. (1989) 139 (6437) *NLJ* 1772

116 However, note the potential impact of the Human Rights Act 1998. This is discussed at the end of this chapter

117 For a discussion of this and the problems it creates in terms of the offence of careless driving see SMITH, J.C. 1999. p.488

2 of 1992).¹¹⁸ The relevant point of law for consideration by the Court of Appeal was '[w]hether the state described as "driving without awareness" should, as a matter of law, be capable of founding a defence of automatism.'¹¹⁹ Lord Taylor reviewed the case law relevant to automatism as he was of the opinion that the answer to this question required a review of the 'requirements and limits of the defence of automatism'.¹²⁰

Lord Taylor, having reviewed the authorities argued before him and employing Lord Lane's two part test from *Burgess*, stated that the appeal fell at the first hurdle because:

the 'proper evidential foundation' for the defence of automatism was not laid in this case by Professor Brown's evidence of 'driving without awareness.' As the authorities cited above show, the defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough.¹²¹

Whether the total destruction of voluntary control is required in cases of automatism which do not entail driving offences is a moot point. The House of Lords did not require the total destruction of voluntary control for insane automatism in *Sullivan*, and in *Quick* the defendant exhibited some control over his movements. In *Burgess* the Court of Appeal restricted the ambit of the defence of non-insane automatism by the use of the internal/external distinction.

However, in the driving cases total loss of voluntary control has been required.¹²² In *Attorney General's Reference (No 2 of 1992)* expert evidence had, in Lord Taylor's judgment, shown

118 [1993] 4 All ER 683

119 [1993] 4 All ER 683, 685

120 [1993] 4 All ER 683, 685

121 [1993] 4 All ER 683, 689. Cases referred to in Lord Taylor's opinion: *Bratty v A-G for Northern Ireland* [1961] 3 All ER 523, [1963] AC 386, [1961] 3 WLR 965, HL., *Broome v Perkins* [1987] RTR 321, DC, *Hill v Baxter* [1958] 1 All ER 193, [1958] 1 QB 277, [1958] 2 WLR 76, DC, *M'Naghten's Case* (1843) 10 Cl & Fin 200, [1843—60] All ER Rep 229, 8 ER 718, HL, *R v Burgess* [1991] 2 All ER 769, [1991] 2 QB 92, [1991] 2 WLR 1206, CA., *R v Hennessy* [1989] 2 All ER 9, [1989] 1 WLR 287, CA., *R v Quick*, *R v Paddison* [1973] 3 All ER 347, [1973] QB 910, [1973] 3 WLR 26, CA. *R v Sullivan* [1983] 2 All ER 673, [1984] AC 156, [1983] 3 WLR 123, HL, *R v Toner* (1991) 93 Cr App R 382, CA., *Roberts v Ramsbottom* [1980] 1 All ER 7, [1980] 1 WLR 823, *Watmore v Jenkins* [1962] 2 All ER 868, [1962] 2 QB 572, [1962] 3 WLR 463, DC.

122 *Attorney General's Reference (No 2 of 1992)* [1993] 4 All ER 683, 688

that the defendant had retained some control of the lorry he was driving, albeit very limited control. However, this was sufficient to mean that the 'learned recorder ought not to have left the issue of automatism to the jury in this case.'¹²³

In *Hill v Baxter*, Pearson J. considering the defence's case that their client could not be said to be driving because he was in a state of automatism said:

the question at issue was and is whether he was driving the car. In any ordinary case, when once it has been proved that the accused was in the driving seat of a moving car, there is, *prima facie*, an obvious and irresistible inference that he was driving it.¹²⁴

The driver of a car has an 'essential duty' to keep himself awake. Only some 'extraordinary mischance' which renders a driver 'unconscious or otherwise incapacitated from controlling the car' will provide a defence of automatism. However, in *Hill v Baxter* there is a suggestion that a defendant who is by the 'onset of some disease ... reduced to a state of coma and is completely unconscious' or 'having an epileptic fit, so that he is unconscious and there are merely spasmodic movements of his arms and legs' may have a defence.¹²⁵ If this was the law in 1957 then the later driving cases and *Sullivan* have narrowed the defence.

It is arguable whether Pearson J. meant those reduced to a state of coma to include diabetics. But if he did, social policy has also affected the defence of automatism with regard to diabetics in driving cases. In *Moses v Winder*,¹²⁶ the defendant had an accident following the onset of a diabetic coma which he thought he had controlled by eating some sweets. He was charged with dangerous driving, but the charges against him were dismissed by the magistrates who heard the case. On appeal by the prosecution to the High Court, Roskill L.J. said of the defendant: '[i]n those circumstances he failed plainly to take those precautions which in those circumstances he ought to have taken, both in his own interest and in the interest of public safety. To allow a defence of automatism to succeed in a case of this kind would add greatly

123 [1993] 4 All ER 683, 690

124 *Hill v Baxter* [1957] 2 WLR 76, 83

125 *Hill v Baxter* [1957] 2 WLR 76, 83. All quotations in this paragraph

126 [1981] RTR 37

to dangers to the life and limbs of those on the roads.’¹²⁷ The case was remitted to the justices with a direction to convict.

In *Moses v Winder* the issue of prior fault was relevant. That is the question of how far the criminal law should excuse a defendant who has to some extent rendered herself open to the risk of automatism? Should she have the right to claim the defence when the automatism occurs? Clearly if a driver is aware of the onset of coma then there are issues apart from the automatism that ought to be considered. The question of whether the defendant’s own behaviour either triggered the automatism or she was aware that she might be entering an automatic state may affect her ability to claim the defence.¹²⁸

However this proviso does not apply in the case of diabetics who suffer a diabetic coma without warning as was the situation in *Broome v Perkins*¹²⁹ and in *Watmore v Jenkins*.¹³⁰ There is some evidence that changes in insulin may bring on diabetic comas in those whose illness has until the change been perfectly manageable. An article in the *Guardian*¹³¹ has shown that the British Diabetic Association withheld a report¹³² showing that diabetics were at risk from genetically engineered insulin. This insulin has been used by the medical profession since the 1980’s and has the alleged unfortunate side effect of causing hypoglycaemic episodes without warning in 10% of patients using the treatment. The report claimed that ‘doctors and specialists had failed to listen to their patients and the distress and dangerous symptoms had

127 [1981] RTR 37, 41

128 In *R v Bailey* [1983] 2 All ER 503 the Court of Appeal stated that ‘self induced’ automatism caused by the defendant’s failure to take food after a dose of insulin was insufficient fault on the part of an accused to permit the defence of automatism to be withdrawn from the jury. The court discussed *R v Lipman* [1969] 3 All ER 410 and *DPP v Majewski* [1976] 2 All ER 142. In *Bailey* it was said that ‘Automatism resulting from intoxication as a result of a voluntary ingestion of alcohol or dangerous drugs does not negative the mens rea necessary for crimes of basic intent.’ [1983] 2 All ER 503, 506. The issue of prior fault is discussed in chapter 5

129 (1987) 85 Cr App R 321

130 [1962] 3 WLR 463

131 9th March 1999 BROWN, P. Diabetics not told of Insulin Risk. p.6

132 The report followed the commissioning of research by the Association following the receipt of 3,000 letters of complaint from diabetics, and according to the *Guardian* was to have been published in the British Medical Journal in March 1993

been ignored.’ The researchers who compiled the report had considered 400 of 3,000 letters of complaint received by the British Diabetic Association following the introduction of genetically engineered insulin. ‘[M]any correspondents reported that a diabetic condition which had been stable and controlled over many years and allowed a full and normal life, suddenly changed and became problematic and life disrupting.’¹³³ The report stated ‘There were several reports of people who had been prosecuted by the police after being involved in accidents while having a hypo’. It is hard to make a sustainable case for the imposition of criminal liability in cases such as these. But given the inflexibility of the definition given to driving by the courts it is unlikely that such a defendant would escape liability.

Determinations of Criminal Responsibility

On occasions the courts seem to have shown an ambivalence towards the automatism defence because of worries that it might be misused. ‘It is not sufficient for a man to say “I had a black-out”; for “black out” as Stable J. said in *Cooper v McKenna, Ex parte Cooper* “is one of the first refuges of the guilty conscience as a popular excuse.”’¹³⁴ In *Sullivan*, Lawton L.J. described the case as ‘untainted by the possibly bogus element of most defences of automatism’.¹³⁵ In *David Peter Stripp*, Ormrod L.J. referred to the Australian case of *Cooper v McKenna*¹³⁶ and having quoted with approval the statement cited above, he continued: ‘for a defence of automatism to be “genuinely raised in a genuine fashion”, there must be evidence on which a jury could find that a defence of automatism exists.’¹³⁷ From this it is possible to deduce that certain judges have revealed a scepticism towards the defence. This is well expressed, in an American case by Sharp C.J. ‘Judges everywhere distrust the plea of

133 The Association is reported as stating that ‘The message of The Posner Report was right it was just too alarmist, ... It is a message that we’re still trying to get out.’

134 *Bratty* [1963] AC 386, 413-4 (Lord Denning). Repeated in *Broome v Perkins* (1987) 85 Cr App R 321, 328 (Gidewell J.)

135 [1983] 1 All ER 578, 579 (CA)

136 *ex parte Cooper* [1968] Qd LR 406

137 (1978) 69 Cr App R 318, 321 .

unconsciousness and apprehend that jurors may repose hasty confidence in it'.¹³⁸ Perhaps this is because, non-insane automatism alone amongst the mental condition defences provides a complete acquittal for the defendant because the voluntariness of his action has not been proved.¹³⁹

In determining criminal responsibility the courts consider voluntariness where the evidence suggests that the presumption of voluntariness may be rebutted. However, more often the consideration of a court will focus on the actus reus and mens rea of the crime. Academically, it is a matter of debate whether questions regarding voluntariness should go to mens rea or actus reus. Norrie sees voluntariness as a 'central requirement' of the actus reus.¹⁴⁰ Smith is more circumspect, but he is clear that voluntariness is in some way more 'fundamental' than the elements which are normally thought of as 'mens rea'.¹⁴¹ Neither do Lord Simon's comments in *DPP for Northern Ireland v Lynch* clarify the matter. They seem to suggest that voluntariness as a mental element is separate from either mens rea or actus reus.¹⁴² Presumably Lord Simon sees volition either as going to actus reus via the medium of the voluntary act or as a separate element, the voluntariness of the act to be proved by the prosecution, but clearly he does not see it as going to mens rea.

If the voluntariness of the act is a separate element and yet fundamental anyone who raises sufficient evidence of involuntariness must be acquitted.¹⁴³ However, the courts have restricted the possibility of outright acquittals for automatism. They have achieved this by dividing the

138 *State v Cadell* (1975 NC) 215 SE 2d 348, 369

139 The philosophical and jurisprudential basis for the defence will be discussed in Chapter 5

140 NORRIE, A. 1993. p.111

141 SMITH, J.C. 1999. p.38

142 'Lastly, actus reus and mens rea are misleading terms; since (other than exceptionally) a mental state is not criminal without an accompanying act and an act is not criminal without some accompanying mental element. Both terms have, however, justified themselves by their usefulness; and I shall myself employ them in their traditional senses - namely, actus reus to mean such conduct as constitutes the crime if the mental element involved in definition of the crime is also present (or, more shortly, conduct prohibited by law); and mens rea to mean such mental element, over and above volition, as is involved in the definition of the crime.'
[1975] AC 653, 690

143 Sufficient evidence for a jury to doubt that the Crown had proved voluntariness

defence of automatism into two parts non-insane automatism resulting in an acquittal and insane automatism resulting in a verdict of not guilty by reason of insanity where the court retains the right of disposal. Presumably the insane automaton will be seen as claiming, under the M’Naghten Rules, that because of ‘disease of the mind’ he did not know the ‘nature and quality of his act’. In reality insane automatism forms part of the insanity defence. In practice, the manner in which the M’Naghten rules have been applied has been substantially determined in cases in which involuntariness in the sense of automatism has been asserted.¹⁴⁴

In *Burgess* the test of automatism was said to be twofold: ‘[t]he first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, ... or non-insane automatism.’¹⁴⁵ If this is correct, when insane automatism is considered as a defence to a criminal charge, the evidential burden regarding voluntariness has already been fulfilled by the defence. By considering an automaton not to know the nature and quality of her act then issues of mens rea are removed.¹⁴⁶ Thus, the jury in an insane automatism case may find someone to be excused responsibility, by reason of insanity, without either the voluntariness of the act or mens rea having been established. Because of the effect of an insanity verdict this seems to predicate wrongdoing over culpability. The defendant may be found insane and subject to disposal simply because of her wrongdoing without sufficient consideration of whether she is culpable or of whether her condition equates to insanity from a medical rather than a legal perspective. She may be detained simply because, following *Burgess*, the legal cause of her behaviour is deemed to be internal and she has done something wrong; even where the danger of her repeating the ‘dangerous’ behaviour is very slight. The rationale for imposing criminal responsibility and punishing insane automatons seems entirely based on considerations of public policy.

The question arises: is involuntariness a defence that provides a separate and distinct

144 See for example the impact on the law of insanity of the following automatism cases *R v Kemp*, *Bratty v Attorney General for Northern Ireland*, *R v Sullivan*, *R v Quick*, and *R v Hennessy*

145 [1991] 2 All ER 769, 771

146 See SMITH, J.C. 1999. p.201

exemption from criminal liability? Or, is it simply referred to as a defence, but in fact it constitutes a failure by the prosecution to prove one of the fundamental requirements of criminal liability, the voluntary act, once an evidential burden has been fulfilled by the defence which displaces the normal presumption of voluntariness. The difficulty seems to be that the law is not clear as to what the role of voluntariness/involuntariness is in determining criminal liability. A further complication exists, the evidential burden varies dependent upon what type of automatism is to be pleaded.

Smith's answer seems to be that automatism operates as an independent defence. 'To raise other defences at common law - for example, provocation, self defence, automatism or duress - the accused need do no more than introduce some evidence of all the constituents of the defence; whereupon it is for the Crown to satisfy the jury that at least one of those constituents did not exist.'¹⁴⁷ Again there is a difficulty in viewing automatism in this sense, Smith's last phrase is not true in the case of automatism, where the Crown, once evidence of the automatism is raised, has to prove something did exist - voluntariness.

So, is automatism really a defence at all or is it an assertion of something more fundamental to criminal liability, lack of agency? Ashworth discusses this problem in *Principles of Criminal Law*:

Automatism is not merely a denial of fault. It is more a denial of authorship, a claim that the ordinary link between mind and behaviour was absent; the person could not be said to be acting as a moral agent at the time - what occurred was a set of involuntary movements of the body rather than 'acts' of D.¹⁴⁸

Ashworth also points out that '[a]lthough it is common to refer to automatism as a "defence", in practice voluntary conduct is assumed in all cases.' The suggestion seems to be that automatism may be being referred to as a defence for ease of terminology, because of the restrictions placed by the courts on the criminal law doctrine which requires voluntariness, and

147 SMITH, J.C. 1999. p.27

148 ASHWORTH, A. 1999a. *Principles of the Criminal Law*. (3rd edit.). Oxford University Press. p.101

because of the evidential burden of raising some evidence of automatism.¹⁴⁹ Ashworth when considering whether automatism should be categorised as a defence states that: ‘the discussion that follows has more in common with the treatment of various excuses’.¹⁵⁰ But is automatism or involuntariness an excuse, if there is no authorship of an act, is it that the defendant is being excused from criminal liability or is it that she has no criminal liability, because the act is not hers? There seems to be a distinction here that would explain the fundamental nature of voluntariness in this sense. This explanation would also explain the tension between the conflicting needs of social protection and a clearly delineated boundary for criminal liability, or as expressed above between culpability and wrongdoing.

This may help to clarify matters with regard to automatism, and it makes it possible to see voluntariness as fundamental to criminal liability. However, it would seem that for it to be fundamental to criminal liability voluntariness must go to both *actus reus* and *mens rea*. If it goes to *actus reus* then the raising of an automatism defence displaces the presumption of voluntariness. Then the *actus reus* is not proved if the defence is successful. This reasoning justifies the verdict in non-insane automatism cases - criminal liability cannot be imposed and the defendant is acquitted. But this analysis does not serve in the case of insane automatons, unless it is assumed that criminal liability rests solely on the danger such behaviour may pose to society, whether or not there is a likelihood that such behaviour will recur. In *Bratty*, Viscount Kilmuir was uncertain as to whether automatism went to *actus reus* or to *mens rea*. Considering the principles laid down in *Woolmington's* case he said:

Nevertheless, one must not lose sight of the overriding principle, laid down by this house in *Woolmington's* case [1935] AC 462, that it is for the prosecution to prove every element of the offence charged. One of these elements is the accused's state of

149 ‘The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of insanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. In order to displace the assumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity.’ *Bratty* [1963] AC 386, 413-4 (Lord Denning)

150 ASHWORTH, A. 1999a. p.101

mind; that he acted consciously and voluntarily, and the prosecution need go no further. But if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary *mens rea* - if indeed the *actus reus* - has not been proved beyond reasonable doubt.¹⁵¹

If, as Smith asserts, the 'voluntary act is a more fundamental element of criminal liability than intention to cause, or foresight of results which we normally think of as *mens rea*':¹⁵² then a further question has to be addressed. Should something so fundamental be overridden by public policy considerations? Clarkson and Keating suggest that such matters should be determined by principle not by reference to *actus reus* and *mens rea*.

In *Attorney General's Reference (No 3 of 1998)*¹⁵³ the Court of Appeal expressed concern about 'public safety considerations being employed to justify the making of orders against those who have done nothing which can fairly be stigmatised as a criminal act.' These difficulties were seen by Judge L.J., who gave judgment on behalf of the court, to become the more pronounced when crimes of a serious nature are committed.¹⁵⁴

Where on an indictment for rape it is proved that sexual intercourse has taken place without the consent of the woman, and the defendant has established insanity, he should not be entitled to an acquittal on the basis that he mistakenly but insanely understood or believed that she was consenting. But when an individual surrounded by a group of much larger, aggressive and armed youths, strikes out and lands a blow on one of them who unfortunately falls to the ground sustaining a fatal head injury, it would be unjust if he were prevented from inviting the jury to consider that his violence might have been lawful, merely because as a result of insanity, he believed the mob was a group of devils attacking him because (as the defendant in the present case believed) he was Jesus Christ. Excluding this individual's own damaged mental faculty at the time, the jury might conclude that although he caused death, his actions were not unlawful, and so did not constitute the *actus reus* of murder, or manslaughter.¹⁵⁵

151 [1963] AC 386, 407

152 SMITH, J.C. 1999. p.38. Emphasis in original

153 [1999] 3 All ER 40

154 [1999] 3 All ER 40, 48

155 [1999] 3 All ER 40, 48-49

What Judge L.J. seems to be saying, in this hypothetical example, is that whilst both defendants appear to be suffering from delusions which lead them to draw invalid conclusions, one should be held criminally liable and the other should not. One defendant could on the evidence before the court be said to be acting in self defence in circumstances which would not be unlawful, though his appreciation of those circumstances was not accurate. His insanity is not relevant to his act though his act was dangerous. The appellant whose insanity leads him to believe that the woman is consenting to sexual intercourse appears to be viewed to be suffering from an insane delusion which is relevant to his criminal culpability. There is an inconsistency in this reasoning with regard to social policy as it is applied in cases of automatism. The defendant who thinks he is Jesus Christ and attacks other individuals in the community could be viewed as having committed a dangerous act. If this type of defendant deserves an acquittal why is an acquittal not available to an epileptic when, in the words of Sullivan's counsel: 'there is no exercise of the mind function as the law recognizes it'?¹⁵⁶

What Judge L.J.'s speculation does reveal however is that the courts are concerned with the problems created by the law in this area. This is perhaps better expressed in *R v Antoine*, which confirmed the decision in *Attorney General's Reference (No 3 of 1998)*.

Throughout history, seriously anti-social acts, particularly acts of violence, have been committed by people whose mental capacity was such that they were not responsible, or not fully responsible, for their acts, or could not fairly be required to stand trial. Such cases pose an inescapable public, moral and human rights dilemma: for while such people may present a continuing danger from which the public deserve to be protected, it would be offensive to visit the full rigour of the law on those who are not mentally responsible, or not able to defend themselves, as an ordinary person of sound mind would be taken to be, and who may (despite their mental incapacity) have done nothing wrong or dangerous.¹⁵⁷

In automatism cases it seems that this need to do justice sometimes leads to disparities between the law as declared by the higher courts and the law as practised. How often this occurs is difficult to establish because as previously stated few automatism cases are reported.

¹⁵⁶ ROYAL SOCIETY OF MEDICINE. 1985. p.28.

¹⁵⁷ [1999] 3 WLR 1204, 1208 (CA) (Bingham L.C.J.)

However research reveals the following cases which seem to be at variance with the law as stated by the appellate courts.

In *Broome v Perkins*,¹⁵⁸ the justices who heard the case at first instance found that:

(a) The defendant, a diabetic, had spent the morning at work. He followed his normal daily routine but on his way home had an attack of hypoglycaemia. The defendant had taken all reasonable steps to prevent himself from acting involuntarily and could not reasonably have foreseen the attack.

Relying on the medical evidence provided by the defence the justices stated:

We accepted that at some stage on his journey home the defendant lapsed into what could be described as 'automatic pilot'. Although he was not in a coma, we were of the opinion that the defendant was not conscious of what he was doing and that his actions were involuntary and automatic.¹⁵⁹

The Court of Appeal remitted the case with a direction to convict, on the basis that the justices' findings were incorrect in law. The Court of Appeal accepted the prosecution argument that the accused must have been driving for certain parts of the journey. Glidewell L.J. acknowledged that the case had been given serious consideration by the justices and that in some way the defendant's behaviour following the dangerous driving must be taken into consideration:

Their case is admirably stated and, albeit I am of the opinion that I have just expressed, that they should have convicted, it is clear that the facts set out in the case provide much material for mitigation, both as to the defendant's medical state and as to his conduct after he recovered when he and his wife first checked to see if there had been an accident and then went straight to the police station. The justices, when they have to reconsider the matter, are, of course, fully entitled to take all of that into account in deciding what penalty they should impose.¹⁶⁰

Despite the Court of Appeal's decision in this case and in *Attorney General's Reference (No 2*

158 (1987) 85 Cr App R 321

159 (1987) 85 Cr App R 321, 328

160 (1987) 85 Cr App R 321, 333

of 1992) the courts are still refusing to convict some motorists who plead automatism. Though it is clear that on the meaning given to driving in the appeal cases the defendant's might be described as 'driving' in the legal sense. In 1999 in the unreported case of *R v Milne*, a diabetic obtained an acquittal on the grounds of non-insane automatism to a charge of dangerous driving because he suffered a hypoglycaemic episode which resulted in the offence being committed.¹⁶¹ In *R v Whoolley*¹⁶² the driver of an HGV wagon which crashed into a column of slow moving traffic was acquitted on the grounds that sneezing could produce a state of automatism. This was despite the fact that the accident which resulted involved seven other vehicles, closed the M62 motorway for a 'couple of hours' and caused some serious injuries. Whether a sneezing fit is sufficient to found a defence of automatism is a moot point, does someone who has a sneezing attack retain some control over their vehicle? In *Attorney General's Reference (No 2 of 1992)* the law regarding driving was stated as being that some control, 'albeit limited' was sufficient to found criminal liability. Lord Taylor said 'the defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough.'¹⁶³

However, in the civil law in the case of *Mansfield v Weetabix*,¹⁶⁴ Leggatt L.J. in the Court of Appeal found that the civil law in assessing negligence required a different standard of driving with regard to automatism than the criminal law. In this case automatism prevented a lorry driver from controlling his vehicle with the result that it crashed into a shop owned by the plaintiffs, causing serious damage. This failure to control the vehicle was held to be due to automatism and not to the driver's negligence, even though the onset of the automatism was slow. The driver of the lorry was unaware that he had a malignant insulinoma, this 'resulted in a hypoglycaemic state in which his brain was starved of glucose and unable to function properly. That was what caused the accident.'¹⁶⁵ Leggatt L.J. considered that: '[t]here is no reason in principle why a driver should not escape liability where the disabling event is not

¹⁶¹ Thanks to Jo Martin of the Camberwell CPS for this information

¹⁶² Unreported November 13th 1997

¹⁶³ [1993] 4 All ER 683, 689

¹⁶⁴ [1998] 1 WLR 1263

¹⁶⁵ [1998] 1 WLR 1263, 1265

sudden, but gradual, provided that the driver is unaware of it.’¹⁶⁶ Despite Legatt L.J.’s insistence that there was no necessity for the requirements regarding driving to be the same in the civil and criminal law, it seems to say the least odd that they should have such divergent views. There seems to be no policy reason why standards of care in driving should differ so markedly between the civil and the criminal law, or as to why whether someone’s brain is functioning properly should be relevant to determinations of civil liability but not criminal liability. Yet *Roberts v Ramsbottom*¹⁶⁷ which considered ‘civil and criminal cases indifferently’¹⁶⁸ was disapproved.

Judges’ sympathies have extended to those who are traumatised, although in *R v Hennessy*, Lord Lane said that ‘stress, anxiety and depression’ were not in themselves ‘separately or together external factors of the kind capable in law of causing or contributing to a state of automatism.’¹⁶⁹ In *R v T*¹⁷⁰ the trial judge permitted the consideration of a defence of automatism to a charge of robbery and assault. The defence was based upon the claim that the defendant had been in a dissociative state at the time of the offence as a result of being raped some three days earlier.¹⁷¹

A number of defendants have been acquitted of assault following a successful automatism plea. Mackay refers to an epileptic, Sandra Mcfarlane, who assaulted a police officer and comments that the court appeared, ‘to ignore completely the obvious impact of Sullivan’.¹⁷² The *Daily Star*¹⁷³ reported that Steve Stott ‘accused of a bedroom attack on a woman was freed yesterday after a court heard he had been sleepwalking.’ At Worcester Crown Court, ‘lawyers agreed he was asleep and the indecency charges were dropped.’ Similarly in *R v Turner*,

166 [1998] 1 WLR 1263, 1265

167 [1980] 1 WLR 823

168 [1998] 1 WLR 1263, 1266

169 [1989] 1 WLR 287, 294

170 [1990] Crim LR 256

171 She was found guilty by the jury

172 MACKAY R.D. 1995. p.39

173 Wednesday 20th September 1995. p.7

another unreported case, a woman who had been involved in a road accident and when breathalysed found to have excess alcohol in her bloodstream had the charge of driving under the influence of excess alcohol withdrawn by the prosecution. Dr. Koch commenting on the case summarised the psychological evidence and legal issues as follows:

The evidence was consistent with somnambulism. The 'duty of care' issue, and her pre-accident drinking, was not thought relevant as she had never before performed complex motor tasks whilst asleep and therefore did not feel her previous sleepwalking was a significant problem.

The outcome: It was argued that the appropriate outcome should be an acquittal on the grounds of non-insane automatism/somnambulism. The expert evidence after due consideration, and presumably expert review, was accepted and the prosecution case dropped.¹⁷⁴

In his commentary on the case he states: 'Defences of sleepwalking are being constructed in other areas of behaviour e.g. sexual behaviour, indecent assault. Somnambulism is a discreet condition which requires careful assessment as do duty of care issues.'¹⁷⁵ If he is right, it seems that the medical experts and possibly the prosecution lawyers have digressed to some considerable extent from the Court of Appeal's decision in *Burgess*. In *Burgess* the Court of Appeal appeared to view sleep disorders as having an internal cause and therefore only founding a defence of insane automatism.

The problem with trying to assess how many successful non-insane automatism pleas are heard by the courts is lack of reporting. Recently the *Times* reported that:

an advertising executive made legal history yesterday when he became the first accused killer believed to have been cleared because he suffered from a severe attack of diabetes. Alasdair Padmore, 37, flew into an uncontrollable rage and stabbed a Department of Trade and Industry official to death with a kitchen knife after entering a state of hypoglycaemic automatism. Nicholas Trent, 45, his landlord and house mate, died from a single wound to the heart. He was found in the garden of a house two doors away, where he had fled after jumping over fences in a desperate attempt to

174 KOCH, H.C.H. 1999. *R v Turner* (1999) 9 (3) *Pil Case Notes*. Emphasis in original

175 KOCH, H.C.H. 1999

escape.¹⁷⁶

The case will not be reported in the law reports because ‘Mark Dennis, for the prosecution, dropped the case at the Old Bailey after accepting that the defendant’s condition, of which he was unaware and unable to control at the time, took over.’¹⁷⁷ This case, the case of Abdul Janjirker¹⁷⁸ and the case of Colin Kemp prove that it is possible to gain an acquittal to the most serious criminal charge on the grounds of non-insane automatism.

European Convention on Human Rights and Fundamental Freedoms

It is important to note here, that the European Convention on Human Rights (the Convention) will add a new dimension to this debate.¹⁷⁹ Both in terms of what it has to say about deprivation of liberty and in terms of the right to a fair trial. These may affect the disposal of those found to be insane automatons and the burden of proof in automatism cases.

Burden of Proof.

In terms of the burden of proof the relevant Convention Article, 6(2), states that ‘Everyone charged with a criminal offence should be presumed innocent until proven guilty according to the law.’ The relevance of Article 6(2) to the defence of automatism is that it may be argued that the reversal of the burden of proof particularly in the case of insane automatism is a contravention of the presumption of innocence. The English courts have considered the presumption of innocence in relation to the burden of proof imposed upon defendants in cases

176 *The Times* 17th December 1999. p.3

177 *The Times* 17th December 1999. p.3

178 Abdul Janjirker killed ‘a teenager in a road rage confrontation.’ His case was heard by two juries as the first jury were unable to reach a verdict with regard to manslaughter whilst acquitting him of murder. At his retrial he was found not guilty. His defence was stated in newspaper reports to be based on Post Traumatic Stress Disorder, following a blow on the head by a brick. *Daily Express* 26.9.2000. p.6

179 Human Rights Act 1998 particularly s 2 which requires a court when making a determination affecting a Convention right to take into consideration, inter alia, any ‘judgment, decision, declaration or advisory opinion of the European Court of Human Rights.’

of diminished responsibility, special defences under the Misuse of Drugs Act 1971¹⁸⁰ and the Prevention of Terrorism (Temporary Provisions) Act 1989.¹⁸¹

Lord Woolf, giving judgment in the Court of Appeal in *R v Lambert and others*,¹⁸² rejected the appellants' claim that the imposition of a persuasive burden of proof contravened Article 6(2). He referred to the European Court of Human Rights' judgment in *Saliabaku v France*¹⁸³ and reiterated Lord Hope's comments in *Kebilene* '[a]s a matter of general principle therefore a fair balance must be struck between the demands and general interest of the community and the protection of the fundamental rights of the individual.'¹⁸⁴ The appellants argued that their fundamental rights in this respect meant that the burden of proof should be evidential. This argument was forcefully rejected by the court who viewed the arguments expressed by the European Court of Human Rights and the Canadian Supreme Court in *R v Chaulk*¹⁸⁵ as supportive of their decision that the burden of proof in cases of diminished responsibility did not contravene the Convention.¹⁸⁶ The reason given for the court's decision was that: '[t]he change in the law brought about by s.2 [Homicide Act 1957] was of benefit to the defendants who were in a position to take advantage of it. It does not matter whether it is treated as creating a defence to a charge of murder or an exception or as dealing with the capacity to commit the offence of murder ... s.2 still does not contravene art. 6.'¹⁸⁷

180 The burden of proof in the case of diminished responsibility is the same as that in insane automatism, that is the burden of proof is on the defendants to prove diminished responsibility, on the balance of probabilities

181 *R v DPP, ex parte Kebilene and others* [1999] 3 WLR 972

182 *R v Lambert, R v Ali, R v Jordan*, (2000) Times September 5. The cases were heard together. *R v Ali and R v Jordan* were cases where a plea of diminished responsibility had been made in response to a charge of murder. *Lambert* concerned the special defence provided by Section 5(4) of the Misuse of Drugs Act.

183 (1988) 13 EHRR 379

184 *R v DPP, ex parte Kebilene and others* [1999] 3 WLR 972, 997

185 [1990] 3 SCR 1303

186 For a discussion of the burden of proof in relation to the Convention see ASHWORTH, A. 1999b. Article 6 and the Fairness of Trials. [1999] *Crim LR* 261-272, p.265-67 and CAPE, E. 2000 The Human Rights Act Points for Defence Lawyers. November 2000 *Legal Action* 29-30. See also the commentary on *R v Kebilene* [2000] *Crim LR* 486

187 *R v Lambert, R v Ali, R v Jordan* (2000) Times September 5.

Where does this leave the differing burdens of proof in automatism? In *Lambert* the structure of the offences was seen as important. In the case of the offence under the Misuse of Drugs Act 1971 the court took the view that, as Parliament had decided to structure an offence so as to create a defence based on a persuasive burden of proof, Parliament was in a better position than the court to evaluate the social policy issues underlying the creation of the defence. However Lord Woolf also stated that where 'the defendant is being asked to prove an essential element of an offence this will be more difficult to justify'.¹⁸⁸ If it is accepted that in the case of automatism what is being argued is that a fundamental element of criminal responsibility was missing at the time of the commission of the wrongdoing then this would seem to fall within Lord Woolf's category of burdens placed on defendants which are 'more difficult to justify'.

If Lord Woolf is right and placing a persuasive burden of proof on a defendant is less sustainable when a defendant 'is being asked to prove an essential element of an offence' then the burden of proof in insane automatism cases is open to question. Such an approach would create real problems for the courts, not the least being how they would separate the requirements of the insanity defence from the defence of insane automatism which is based upon the voluntary act requirement.¹⁸⁹ If the distinction made by Lord Woolf is correct then the burden of proof in cases of insane automatism seems to be open to challenge.

However, it should be noted that Lord Woolf also remarked that 'what fairness requires can differ depending on the circumstances of the case.'¹⁹⁰ Additionally at the beginning of his judgment Lord Woolf referred to the need in decisions of this type to balance the 'fundamental rights of the individual' against the 'demands and general interests of the community'. It seems therefore that once again if the argument is raised before a court questions of social policy will be taken into consideration.

188 (2000) The Times September 5

189 Though a similar argument might be made in respect of the insanity defence. That is that the sanity of the defendant might be said to be an essential ingredient of a particular offence because it is a prerequisite of criminal responsibility

190 (2000) The Times September 5

Liberty and Security of Person

A further problem arises in respect of the plea of insane automatism with regard to Article 5 of the Convention.¹⁹¹ The Convention itself needs to be interpreted in the light of its case law.

The question is whether it would be a contravention of someone's rights under the Convention to deprive that person of her liberty because of a temporary malfunction of her mental faculties. In the *Winterwerp* case guidance was given as to the protections which should be afforded to individuals:

In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority—that is, a true mental disorder—calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a

191 Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a)** the lawful detention of a person after conviction by a competent court;
- (b)** the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c)** the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d)** the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e)** the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f)** the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

disorder.¹⁹²

In insane automatism cases where defendants are found not guilty by reason of insanity there will usually be medical evidence of some malfunction. The question is whether it will be acceptable as evidence of unsoundness of mind and whether, applying *Winterwerp*, this will be sufficient to satisfy the Convention that deprivation of liberty is necessary. It must at least be questionable whether deprivation of liberty will be justified, if imposed, in cases of insane automatism from diabetes or sleepwalking because of the need for a person to be 'reliably shown to be of unsound mind' which 'must be of a kind or degree warranting compulsory confinement'. The point at issue in such cases is likely to be the strength of the medical evidence with reference to these issues. However, it is not clear whether *Winterwerp* would be of assistance to those who are found to be insane automatons but subjected to a supervision and treatment order rather than detention.^{193 194}

192 (1979) 2 EHRR 387 para 39. In *Varbanov v Bulgaria* Application No 31365/96. Judgment given 5.10.2000. The European Court of Human Rights confirmed the three requirements set out in *Winterwerp* regarding the deprivation of liberty on the grounds of unsoundness of mind

193 Criminal Procedure (Insanity) Act 1964 s 5(2) as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. I am indebted to Professor R.D. Mackay for pointing this out to me.

194 The only application regarding the operation of the automatism defence was declared inadmissible by the European Commission of Human Rights in 1995. *Foster v UK* Application no 24725/94. The application, concerned a claim that the English courts in rejecting the claim of automatism had violated the applicant's rights, the complaint was made under Articles 5, 6, 7 and 13 of the Convention on the grounds, inter alia, that the judge at his trial refused to allow psychiatric reports to be submitted and that the judge did not leave the defence of automatism to the jury. The Commission rejected his claims on the grounds that the offence with which he was charged was a criminal offence in England, his appeal had been heard by the Court of Appeal who rejected his claim that he was convicted of an 'offence unknown to law' at the time of the commission of his actions, and there were no procedural deficiencies in the hearing of his case. Foster's application undoubtedly was weakened by the fact that his counsel had advised him that he had no defence of automatism, and the trial judge whilst excluding submission of the psychiatric reports did allow oral evidence as to Foster's psychiatric state at the time of the act of arson on his sister's home

Summary

The single most potent force in the shaping of the law of automatism appears to have been social protection. That is the policy enunciated by the courts that in the case of involuntary behaviour resulting in a criminal charge, '[i]t seems to us that if there is a danger of recurrence that may be an added reason for categorising the condition as a disease of the mind',¹⁹⁵ and thus insane automatism. Lord Denning in *Bratty* said 'any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind'.¹⁹⁶ It seems that the courts have indeed 'started down the road' where involuntary conduct has been 'subsumed' into 'the concept of insanity' where such conduct could be identified as 'the product of a disease of the mind'.¹⁹⁷ It is this policy which has led to the definition given to 'disease of the mind' in *Kemp* and confirmed in *Sullivan*.

In order to escape from the confines of the decisions in *Kemp* and *Bratty*, Lawton L.J. in *Quick*, developed the notion of an internal/external trigger as a cause of automatism. This distinction has been employed by the courts and has distinctly arbitrary consequences for some defendants. In *Quick* it was said that: '[t]he difficulty arises as soon the question is asked whether he should be detained in a mental hospital because he had a low blood sugar reaction; and common sense is affronted by the prospect of a diabetic being sent to such a hospital'.¹⁹⁸ Therefore Lawton L.J. sought to qualify the application of the M'Naghten rules. However, the application of the M'Naghten rules to cases of hyperglycaemia and the application of a strict test of involuntariness in driving cases has narrowed the use of the defence of automatism for diabetics. Similarly the wide definition given to disease of the mind has led to the classification of sleep disorders and epilepsy as conditions which attract an insanity defence once the question of automatism is raised.

There are three problems created by these decisions. The first is that the definition given to

¹⁹⁵ [1991] 2 All ER 769, 774

¹⁹⁶ [1963] AC 386, 412

¹⁹⁷ *R v Stone* (1999) 134 CCC (3d) 353, 395-6

¹⁹⁸ [1973] 3 WLR 26, 31

disease of the mind is extremely wide. This leads to the second problem the legal definition of disease of the mind does not equate to medical definitions of insanity. Finally, the internal/external distinction created in *Quick* operates in an arbitrary manner which creates injustice. This is particularly true of the distinction made between defendants who suffer from the two different types of diabetic episode: hypoglycaemia and hyperglycaemia.

Further difficulties with the approach taken by the courts were identified at the symposium following *R v Sullivan*. Sullivan's defence counsel saw the labelling of epileptics who claim their actions are involuntary as criminally insane as unfair. A similar argument might be made in respect of 'sleepwalkers' and those in a hyperglycaemic episode. Conversely a diabetic in a hypoglycaemic episode will be seen as not guilty. In terms of labelling such statements seem arbitrary and unfair. Furthermore, Sullivan's counsel suggested that 'the practical and emotional consequences' of an insanity verdict as applied to an epileptic were 'unnecessary and wasteful both for that person and society as a whole.'¹⁹⁹

A different approach has been taken to the defence of automatism in driving cases. In driving cases the policy of social protection has a different result, here the emphasis is not on declaring those who are deemed 'dangerous' to be insane, but rather to deny defendants the opportunity to claim that they were not 'driving'. Thus in *Attorney General's Reference (No 2 of 1992)* Lord Lane said automatism required 'a total destruction of voluntary control'.²⁰⁰ This view is difficult to reconcile with the view taken of automatism in *Bratty* or *Sullivan*.²⁰¹

The courts have been unwilling to allow states of 'stress, anxiety and depression' to be utilised as external factors causing loss of voluntariness, because they constitute 'a state of mind which is prone to recur'; and are not 'capable in law in law of causing or contributing to a state of

199 ROYAL SOCIETY OF MEDICINE. 1985. p.12

200 [1993] 4 All ER 683, 689

201 Though in *Bratty* Viscount Kilmuir, offered the obiter suggestion that driving cases should be separated from other cases of automatism because 'there is no requirement of proof of mens rea.' [1963] 386, 399

automatism. They lack the feature of novelty or accident.²⁰² This is a problematic area for the law given the growth of defences based upon post traumatic stress disorder. These problems will be further discussed in the next chapter in relation to the Australian and Canadian case law. However, it should be noted that not all types of automatism involve novelty or accident, hypoglycaemia certainly does not when suffered by a diabetic.

Thus for social policy reasons the courts have taken a restrictive view of what constitutes automatism. The narrowest definition being given in the driving cases²⁰³ where the criminal law requires 'a total destruction of voluntary control' before automatism may be established. In *AG's Reference (No 2 1992)* it was stated that this was what was required for a defence of automatism to be put to the jury. Similarly in *Sullivan*, social policy considerations dictated that Sullivan's epilepsy amounted to insane automatism because it impaired his 'reason, memory and understanding.' It mattered not whether the 'impairment' was 'organic' or 'functional', 'permanent or transient' provided that it subsisted at the time of the act.²⁰⁴

There is a tension between the social policy objectives underlying the definitions given to the states of insanity and automatism and the criminal law requirement that there be a voluntary act before criminal liability may be imposed. This tension rarely surfaces because the presumption of capacity means that it is assumed that the defendant was acting voluntarily. When it does, in cases where automatism is raised, then it poses a problem for the courts. As Lord Diplock said in *Sullivan*: 'it is natural to feel a reluctance to attach the label of insanity to a sufferer from psychomotor epilepsy'.²⁰⁵

Not all of these difficulties can be addressed in a thesis of this length. However, one of the most pressing questions is whether the courts' preference for social protection over individual culpability is justified and this will be examined in chapter 5. The question of the reform of the

202 *R v Hennessy* [1989] 1 WLR 287, 294

203 See p.62-66 for discussion of the automatism plea in driving cases

204 [1983] 2 All ER 673, 677

205 [1983] 2 All ER 673, 678

insanity defence has been discussed at length elsewhere²⁰⁶ and therefore will not be addressed in any depth. Nevertheless it is accepted that many of the leading automatism cases have defined the defence of insanity. This is because of the perception of the courts of the need for social protection. In assessing the basis of involuntariness as expressed in the defence of automatism it is necessary to focus on how action takes place, what levels of consciousness are required for action to be said to be involuntary or voluntary, and to examine these findings in relation to criminal responsibility. Though Moore's book *Act and Crime* has been the subject of much jurisprudential discussion, the relevance of neuroscientific constructions of consciousness, and how these relate via the modern philosophy of the mind to consciousness has largely been ignored. This thesis aims to address that deficiency. However before considering such matters, it is necessary to examine the case law of Australia, Canada, New Zealand, Scotland and the United States of America to see how courts in other jurisdictions have addressed the problems posed by the 'fundamental' nature of the voluntary act requirement.

206 See for example MACKAY, R.D. 1995., McAULEY, F. 1993. *Insanity, Psychiatry and Criminal Responsibility*, Dublin: Roundhall Press

Chapter 3

In the last chapter some of the problems with the present approach to the defence of automatism were chronicled. In this chapter it is proposed to examine how courts in other jurisdictions have reacted to similar policy pressures in deciding whether a defence of involuntariness should be accepted by the courts, and what form that defence should take.

Scotland

In Scotland the approach to the defence has varied. As previously discussed,¹ in *Fraser* the courts recognised that sleepwalking could be a defence to a criminal charge. The case of *HM Advocate v Ritchie*² also supported the conclusion that there was a defence of unconsciousness in Scottish law³. In *Ritchie*, Lord Murray said:

Turning now to the question of a man's responsibility or irresponsibility for his actions, irresponsibility need not be confined to what to us is the most familiar example, viz, the case of a person who is, in popular language, 'out of his mind'. ... But where the defence is that a person, who would ordinarily be quite justified in driving a car, becomes - owing to a cause which he was not bound to foresee, and which was outwith his control - either gradually or suddenly not the master of his own action, a question as to his responsibility or irresponsibility for the consequences of his action arises, and may form the ground of a good special defence. The question, accordingly, which you have to determine is whether, at the time of the accident, the accused was or was not master of his own action. So put the question becomes a pure question of fact⁴.

This approach was criticised by the Scottish High Court in *HM Advocate v Cunningham* which, when considering whether a dissociative state brought about by an epileptic fugue could constitute automatism, said that:

¹ Chapter 2 p.22

² 1926 SLT 308

³ GORDON, G.H. 1976. Automatism, Insanity and Intoxication. (1976) 21 *Journal of the Law Society of Scotland* 310-6, 311. See also MACKAY, R.D. 1983. The Automatism Defence - What Price Rejection? (1983) 34 (2) *NILQ* 81-106

⁴ 1926 SLT 308, 309

Any mental or pathological condition short of insanity - any question of diminished responsibility owing to any cause, which does not involve insanity - is relevant only to questions of mitigation and sentence.⁵

Interestingly the judgment makes use of the social policy argument to justify the court's decision:

As I see it, the so called 'special defence' in the present case constitutes an attempt to extend the categories of special defences in order to include a new one, namely, something short of insanity, which would lead to an acquittal. For this I can see no warrant in principle. On the contrary, as has been pointed out more than once in previous cases, such a novel type of special defence would be a startling innovation which could lead to serious consequences so far as the safety of the public is concerned. After all, that safety is one of the considerations to which we have to have regard when we are asked to sanction a complete acquittal, if a defence of this nature is sustained by the jury on the facts.⁶

This statement echoes the concerns of the English courts regarding public safety. *Cunningham* remained the law in Scotland until the High Court further considered automatic states in *Ross v HM Advocate*,⁷ a case concerned with offending behaviour following the adulteration of a can of lager with drugs. The defendant drank the lager without any knowledge that it contained drugs. The defendant then attacked those around him with a knife and was tried on charges relating to seven counts of attempted murder. He claimed that his behaviour was caused by the drugged drink and that he should be entitled to a complete acquittal on the grounds that he lacked mens rea, rather than an acquittal on the basis of insanity.

Lord Hope, was of the view that no challenge was being made to *Cunningham* 'on its own facts'. He identified the cause of Ross's lack of control as a 'mental condition of a temporary nature which was the result of an external factor and not of some disorder of the mind which was liable to recur.'⁸ He noted that the external factor was not self induced. He made the

5 1963 SLT 345, 347 (Clyde L.J.)

6 1963 SLT 345, 346-7

7 1991 SLT 564. Five judges sat in the court to hear Ross's appeal. The number is relevant because only a High Court comprised of more judges than sat in *Cunningham* or Parliament could review the law as stated in *Cunningham*. 1991 SLT 564, 566 (Lord Hope)

8 1991 SLT 564, 566

following comments regarding criminal liability and lack of mens rea:

So, if a person cannot form any intention at all, because for example he is asleep or unconscious at the time, it would seem impossible to hold that he had mens rea and was guilty in the criminal sense of anything he did when he was in that state. The same result would seem to follow if, for example, he was able to form intention to the extent that he was controlling what he did in the physical sense, but had no conception whatever at the time that what he was doing was wrong.⁹

Lord Hope makes it clear that he sees this type of acquittal from criminal liability as having a distinct basis in absence of mens rea. He says:

Insanity provides the clearest example of this situation, but I do not see why there should be no room for the view that the lack of evil intention in cases other than insanity, to which special considerations apply, should not also result in an acquittal. Indeed, since it is for the Crown to prove mens rea as well as the actus reus of the offence, it would seem logical to say that in all the cases where there is an absence of mens rea an acquittal must result.¹⁰

Lord Hope sees public policy as relevant in cases where the absence of mens rea is self induced.¹¹ In his view it was also relevant to Ross's case that there was no 'continuing disorder of the mind or body'.¹² He rejected the policy argument put forward in *Cunningham* as inapplicable to cases such as *Ross* where what was being asserted was lack of mens rea: 'due to some external factor which was outwith the accused's control and which he was not bound to foresee' which 'must have resulted in a total alienation of reason amounting to a complete absence of self control.' Thus for Lord Hope it seems social policy issues are not totally determinative of the issue of involuntariness provided that there are 'adequate safeguards against abuse'.¹³

As to the burden of proof, in cases of automatism what needed to be considered by the jury

9 1991 SLT 564, 566

10 1991 SLT 564, 566

11 1991 SLT 564, 566

12 1991 SLT 564, 567

13 1991 SLT 564, 569. All quotations

was, 'whether the Crown had established mens rea, since facts bearing on that point have been put in issue by the defence, and because the onus of establishing mens rea in every case rests throughout on the Crown.'¹⁴ Lord Hope cited with approval the English courts' pronouncements in *Hill v Baxter* and *Woolmington*¹⁵ regarding the acceptance of differing burdens of proof in the cases of insanity and automatism. He suggested that the reason for this distinction between insanity and automatism, is that different legal presumptions are being tested by the two defences. In the case of insanity what must be displaced is 'the presumption of sanity, not that of responsibility'. He argued that in *Ross* the normal rules which governed criminal responsibility applied. Implicit in his argument for this conceptual distinction is the fact that sanity is presumed by the courts, whereas, responsibility for criminal circumstances is not. What was relevant was the temporary 'but total loss of control over his actions'.¹⁶

The definition given by Lord Hope to automatism is 'those cases where the accused, while not insane, is said to have no control over his actions'.¹⁷ The English approach has been somewhat different to this in that, it is not usually loss of control, per se, which is examined in England, but rather loss of consciousness or loss of control of bodily movements.¹⁸ The English courts have been careful to avoid the acceptance of defences based on loss of self control. In *R v Kingston*¹⁹ the House of Lords considered whether there was a defence of involuntary intoxication in English law, the case was appealed from the Court of Appeal which had accepted that such a defence existed. Lord Mustill said 'a loss of self control through the acts of a third party does not in general constitute a defence'.²⁰ He considered *Ross* and concluded:

14 1991 SLT 564, 569

15 *Hill v Baxter* [1957] 2 WLR 76, *Woolmington v DPP* [1935] AC 462

16 1991 SLT 564, 571. Both quotations

17 1991 SLT 564, 571

18 'No act is punishable if it is done involuntarily: and an involuntary act in this context—some people nowadays prefer to speak of it as 'automatism'—means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking.' *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 409 (Lord Denning)

19 [1994] 3 WLR 519

20 *R v Kingston* [1994] 3 WLR 519, 527

‘the law of Scotland concerning the mental element of crime and the effect on it of a disturbance in the defendant’s mental condition is not precisely the same as that which prevails in England’. However, he continued the ‘law as stated by the Lord Justice General (Lord Hope), differs little, if at all, from that which prevails in England.’ In Lord Mustill’s opinion what was relevant to the judgment in *Ross* was that ‘the accused commits the acts while not conscious of what he was doing, and that he was in a state which had been described in some cases as non-insane automatism.’²¹

Whether the English and Scottish defences are similar is a moot point. It seems unlikely that an English court would support Lord Hope’s statement, ‘[t]he same result would seem to follow if, for example, he was able to form intention to the extent that he was controlling what he did in the physical sense, but had no conception whatever at the time that what he was doing was wrong.’²² In England lack of voluntariness relates to unconsciousness or lack of willed bodily movement and in Scotland, according to Lord Hope, it relates to mens rea. The English courts have always resisted what might be termed a defence of irresistible impulse. Lord Mustill says of a defence of involuntary intoxication:

I can only say that the defence runs into difficulties at every turn. In a point of theory it would be necessary to reconcile a defence of irresistible impulse derived from a combination of innate drives and external disinhibition with the rule that irresistible impulse of a solely internal origin (not necessarily any more the fault of the offender) does not in itself excuse although it may be a symptom of disease of the mind.²³

This would seem to explain why the English courts on the whole avoid terminology which relates criminal liability to the ability to control conduct. It also confirms that the higher English courts would be unlikely to accept a defence of non-insane automatism where the defendant was controlling what he did in the physical sense but did not know that it was wrong.

The requirements of the Scottish defence of automatism, as expressed by Lord Hope, form a

²¹ *R v Kingston* [1994] 3 WLR 519, 531. All quotations

²² *Ross v HM Advocate* 1991 SLT 564, 566. In England such an assertion would possibly provide a defence of insanity

²³ *R v Kingston* [1994] 3 WLR 519, 536

three part test: the 'external factor which is alleged must not be self induced, but it must be one which the accused is not bound to foresee and that it must be one which resulted in a total loss of control of his actions in regard to the crime with which he is charged.'²⁴ In order to found a defence all parts of the test must be met. In so far as it conflicted with the decision in *Ross*, *Cunningham* was overruled.²⁵ Lord McCluskey, Lord Allenbridge and Lord Weir supported Lord Hope's conclusions. Therefore, in Scotland as in England the existence of an external factor is necessary for a claim of non-insane automatism. Lord Brand concurred but takes a slightly different approach to the question of automatism:

In my opinion, the defence of automatism is, in principle, the same as the defence of accident. In both cases the failure of the prosecution is due to the absence of mens rea. It follows that in neither case is a special defence necessary. It has always been accepted that, if the tribunal of fact was not satisfied that what was prima facie a criminal act was intended, the prosecution must fail and the accused be acquitted. The issue of accident, although sometimes coupled with a special defence of self defence, has never been regarded as a special defence per se. As the onus is on the Crown to prove mens rea, there can be no onus on the defence to prove the absence of it from whatever cause apart from insanity.²⁶

Lord Brand is drawing attention to the fundamental nature of the plea that an act is involuntary. He was of the opinion that when involuntariness was proved the prosecution case fails for lack of mens rea. He saw involuntariness in this sense as akin to accident and not a special defence. This type of approach would seem to be capable of being implied in the English court's decision in *R v Whoolley*.²⁷

In *Sorley v HM Advocate*²⁸ the three part test as outlined in *Ross* was considered. Lord Cowie stated that the test in *Ross* fell into three parts and that the first two parts of the test were fulfilled in this case. The Crown accepted that Sorley had consumed LSD tablets whose

24 *Ross v HM Advocate* 1991 SLT 564, 572

25 1991 SLT 564, 572 (Lord Allenbridge)

26 1991 SLT 564, 578

27 Unreported (Manchester 13th November 1997). See chapter 2 p.74

28 1991 SCCR 396

‘presence in the can of lager the appellant was not bound to foresee.’²⁹ But the appeal failed on the third part of the test, that is whether the ingestion of LSD ‘resulted in a total loss of control’. On this point there was insufficient evidence. Evidence was required ‘directed to this essential point. And it must provide a causative link between the external factor and a total loss of control.’ Such evidence was unlikely to be convincing unless supported by expert evidence.³⁰ Subsequent case law has determined that in Scotland self induced intoxication does not found a defence of automatism.³¹

What was meant by ‘total loss of control’ was considered in *Cardle v Mulrainey*.³² The respondent claimed that following the involuntary consumption of amphetamine he could not reason and therefore could not exercise self control. In looking at the defence of automatism the Sheriff had considered the definition of insanity because the Sheriff felt this would assist the jury in determining the meaning to be attributed to ‘total alienation of reason’.

The Sheriff concluded that the jury should be instructed to look at the ‘respondent’s whole ability to reason’. This approach would seem to be supported by Lord Hope’s statement in *Ross* ‘[t]he same result would seem to follow if, for example, he was able to form intention to the extent that he was controlling what he did in the physical sense, but had no conception whatever at the time that what he was doing was wrong’.³³ The Sheriff examined the test of insanity given in *HM Advocate v Kidd*³⁴ in order to establish whether the accused’s condition at the time of the offence could be described as total alienation of reason. In *HM Advocate v Kidd*, when determining the test for insanity, the court had rejected the use of the M’Naghten Rules and said in Scotland the test was different.

29 1991 SCCR 396, 401

30 1991 SCCR 396, 403

31 *Ebsworth v HM Advocate* 1992 SCCR 671. It was held that self induced automatism cannot found a defence to a criminal charge. In this case the quantity of drugs taken, about 50 paracetamol and some diamorphine, as said by the court to have been so excessive that the defendant could not claim the defence. Ebsworth claimed to have been taking the medicine to relieve the pain from a broken leg.

32 1992 SCCR 658

33 1991 SLT 564, 566

34 1960 JC 61; 1960 SLT 82

At one time, following English law, it was held in Scotland that if an accused did not know the nature and quality of the act committed, or if he did know it but did not know he was doing wrong, it was held that he was insane. That was the test, but that test has not been followed in Scotland in the most recent cases. Knowledge of the nature and quality of the act, and the knowledge that he is doing wrong, may no doubt be an element, indeed are an element, in deciding whether a man is sane or insane, but they do not, in my view, afford a complete or perfect test of sanity. A man may know very well what he is doing, and may know that it is wrong, and he may none the less be insane. It may be that some lunatics do an act just because they know it is wrong.³⁵

However, the High Court rejected the Sheriff's use of *Kidd* to evaluate total alienation of reason in the context of the special defence as set out in *Ross*. The court said:

Where, as in the present case, the accused knew what he was doing and was aware of the nature and quality of his acts and that what he was doing was wrong, he cannot be said to be suffering from the total alienation of reason in regard to the crime with which he is charged which the defence requires. The sheriff found ... that the respondent's ability to reason the consequences of his actions to himself was affected by his ingestion of the drug. The finding narrates that he was unable to take account in his actions of the fact that they were criminal in character and to refrain from them. But this inability to exert self-control, which the sheriff has described as an inability to complete the reasoning process, must be distinguished from the essential requirement that there should be total alienation of the accused's mental faculties of reasoning and of understanding what he is doing. As in the case of provocation, which provides another example of a stimulus resulting in a loss of self-control at the time of the act, this may mitigate the offence but it cannot be held to justify an acquittal on the ground that there is an absence of *mens rea*.³⁶

In his commentary on *Cardle v Mulrainey*, Gordon presents three alternative interpretations of this decision:

Is the High Court saying (a) that the definition of insanity in *Kidd* was wrong insofar as it accepted that an inability to apply one's reason to control one's action was relevant, where that inability was due to mental illness; (b) that such an inability was irrelevant in the case of non-insane automatism only; or (c) that only a *total* inability so to control one's conduct was relevant in either case, and the sheriff was not entitled on the facts of the instant case to hold that such a total inability was present (or even that it was not

35 1992 SCCR 658, 665. Quoting from *HM Advocate v Kidd* 1960 JC 60, 71 (Lord Strachan). It is because of judgment in *Kidd* that Scots law has been said to recognise an insanity defence of irresistible impulse, rejected by the M'Naghten Rules and the courts in England

36 1992 SCCR 658, 668

proved to be absent)?³⁷

If (a) was accepted then in Gordon's view Scottish law had moved towards an acceptance of the M'Naghten rules and that, like the House of Lords, the High Court was rejecting the idea that the ability to exercise self control through reasoning was relevant to the defence of automatism.

Laurie examines Gordon's concerns regarding *Cardle v Mulrainey* and its treatment of the test of 'total alienation of reason' with regard to automatism cases. Laurie considers that the application of *Cardle v Mulrainey* in the subsequent case of *Carrington v HM Advocate*³⁸ has affected the development of Scots law. In his view, '[t]he reliance placed on the appellant's knowledge of events moves the concept of "total alienation of reason" one step closer to McNaghten.' He sees this as a move away from the traditional meaning attributed to the concept. In Scotland it 'has been treated more as a control-based or volitional test.' He raises objection to this change of emphasis: 'Moreover, the apparent move from an objective to subjective standard is not in keeping with Scottish tradition.'³⁹ The basic thrust of his argument is that this change of emphasis has occurred since the consideration of a non-insane automatism defence in Scotland. This is interesting, what Laurie is claiming is that the defence of insanity has altered because of the acceptance in *Ross* of a non-insane automatism defence. In England the approach taken to claims of automatism also changed the defence of insanity by widening the definition given to disease of the mind, in order to retain control over those who claimed automatism and who, like *Kemp* and *Sullivan*, were seen to have acted in a dangerous manner.⁴⁰

Finally the approach taken to driving in Scotland is substantially different from that in England because it places an emphasis, in driving cases, on the culpability of the defendant. It considers whether she knew that an automatistic episode was likely to occur whilst she was driving. In

37 1992 SCCR 669-70. Emphasis in original

38 1994 SCCR 567

39 LAURIE, G.T. 1995. Automatism and Insanity in the Laws of England and Scotland. (1995) 3 *Juridical Review* 253-65. All quotations p.263

40 See the discussion of in chapter 2 of *R v Kemp* p.45 and *R v Sullivan* p.53-8

MacLeod v Mathieson,⁴¹ the criminal liability of a diabetic was considered. Mathieson had suffered a hypoglycaemic episode when driving causing him to crash into two cars, killing the driver of one of the cars.

But the question in this case is whether a person should be held still to be 'driving' after the onset of an undetected attack, knowing that he is liable to have hypoglycaemic attacks, the onset of some of which he will not be able to detect. It may be a factor of some importance that he drove on his own. If he drives in those circumstances and if such an attack occurs, it is not obvious that he must be regarded as not responsible for the result of any ensuing accident. If the charge is one of careless driving, he will have been charged with driving without due care and attention and *without reasonable consideration for other persons using the road*.⁴²

The Sheriff concluded that Mathieson did know that he was prone to hypoglycaemic attacks, and knew that they could occur without warning and therefore the defence of automatism was not available to him.⁴³ The case commentary highlights two issues: firstly that the case is an 'example of the doctrine of *actio libera in causa* ... The accused may not have been driving at the time of the incident, but his liability like that of a drunken man depends on his state of mind before he lost control of his actions.' Secondly it assumes 'that hypoglycaemia is a proper basis for a defence of automatism, although *Ross* suggests this is not the case.'⁴⁴ Laurie takes the view that the automatism in this case went to *actus reus*. He comments:

the sheriff acknowledged that the defence might be available to someone who suffers such an attack if they had previous knowledge of their condition. That is, such a person would not be 'driving' under the terms of the Act. This implies the defence can affect *actus reus*. This is to be contrasted with the decision in *Ross* in which it was held that automatism affects *mens rea*.⁴⁵

Thus the approach in Scotland has largely been to restrict the defence to cases where the existence of automatism means the prosecution fails to prove *mens rea*, with the exception of *Mathieson* where the defence was seen as relevant to *actus reus*. This differs from the approach

41 1993 SCCR 488 hearing at Sheriff's Court Perth

42 1993 SCCR 488, 491. Emphasis in original

43 1993 SCCR 488, 492

44 1993 SCCR 488, 492

45 LAURIE, G.T. 1995, p.264. Emphasis in original

stated by the courts in England where, in the main, the court's attention focusses on the 'act', rather than mens rea in determining claims of automatism.⁴⁶ Additionally the High Court in Scotland in many of the cases discussed above has been dealing with claims of automatism based on involuntary intoxication. In England this defence has been treated separately from automatism and in *Kingston* the defence was rejected by the House of Lords. However, in England and Wales there seems no reason why involuntary intoxication should not result in acquittal where the defendant asserts that involuntary intoxication prevented her from forming mens rea.⁴⁷

It is not proposed to examine the other jurisdictions researched in the same detail as those of England, Wales and Scotland because of the constraints of space but rather to consider some of the landmark cases in which the internal/external distinction, policy considerations and the burden of proof issues have been dealt with by the courts in Australia, New Zealand and Canada. American case law will be considered separately for the contrasts it provides to the approaches adopted by the law in the other jurisdictions. One thing that is noticeable about the discussions in these jurisdictions is the lack of agreement between those sitting in judgment on these issues. There are frequently dissenting judgements something which is rare in the consideration of such cases in the courts of England and Wales, and Scotland.

In England and Wales the policy of protecting public safety has been of paramount concern, and in Scotland concern that the public should be protected from those who cannot control their actions has also been expressed. The assimilation of automatism with insanity by the breadth of the definition given to disease of the mind was a response to this pressure. In England and Wales and in Scotland the response has been the use of the internal/external distinction in allocating criminal responsibility. Other jurisdictions have faced similar problems regarding the borderline between insanity and automatism.

46 See for example *Bratty v. Attorney General for Northern Ireland* [1963] AC 386, at 409:

'No act is punishable if it is done involuntarily: and an involuntary act in this context -some people nowadays prefer to speak of it as 'automatism' - means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.' (Lord Denning)

47 *R v Kingston* [1994] 3 WLR 519, 525. Such a defendant would escape liability on the first of the grounds detailed by Lord Mustill 'that his immunity flows from general principles of the criminal law.' For a discussion of the status of involuntary intoxication in English law see SMITH, J.C. 1999. p.219

New Zealand case law

Chronologically it seems appropriate to start this section with the consideration of the case of *R v Cottle*.⁴⁸ The purpose of the discussion of automatism by the court was to assist judges in the lower courts considering cases where automatism was raised.

Both Gresson P. and North J. in their judgments considered the discussion of the determinants of criminal responsibility and irresponsibility as discussed by Sir Owen Dixon in his article, *A Legacy of Hadfield, M'Naghten and Maclean*.⁴⁹ The article had, inter alia, explored the difficulties posed by the automatism defence and discussed the two English cases of *Kemp* and *Charlson*.

Dixon's article was critical of the M'Naghten rules in that he argued that they had pushed the courts in 'a strange direction'. One of the grounds for the attack on the M'Naghten Rules arose from his consideration of the case of *Kemp*. The report stated that: '[i]t was common ground that at the time of the attack the prisoner did not know the nature and quality of the act and that all the requirements of the M'Naghten Rules for establishing a defence of insanity were present, save that the question whether the prisoner was suffering from a disease of the mind was in issue.'⁵⁰ Dixon took particular issue with this view of the trial process and to the use of the M'Naghten Rules and the 1883 Trial of Lunatics Act in this way. His view was that the purpose of a criminal trial had been subverted, in that the court's focus of attention had become whether the defendant's plea was one of insane or non-insane automatism. He saw the argument in the case as centred upon the meaning of 'disease of the mind' as defined by the rules. In his opinion the Crown case was not that the defendant was guilty but that he was not guilty by reason of insanity within the M'Naghten Rules. Dixon disapproved of this focus:

In other words, what in the terminology once in use, appeared to be a criminal inquest was not in truth held to determine the guilt of the prisoner but was an inquiry into the question whether he should be held as a criminal lunatic. Is that to be a purpose of

48 [1958] NZLR 999 NZ (CA). Considered by the House of Lords in *Bratty v AG for Northern Ireland* [1963] AC 386, 398 and 401

49 (1957) 31 *ALJ* 255-66

50 DIXON, O. cites (1956) 40 Cr App R 121, 122

indicting or presenting a man? Perhaps the form of verdict prescribed by the Trial of Lunatics Act 1883 has brought about this peculiar result. For I think that in an Australian Court it would sound odd if a Prosecutor for the Queen opened to the jury that he did not say the prisoner was guilty of the crime for which he had been placed in charge, and that it was common ground that by reason of his defect of understanding at the time he was incapable of committing it, but the question for the jury was whether the acquittal should be outright or on the ground of the prisoner's insanity.⁵¹

Dixon goes on to consider the question underlying the decisions in *Charlson* and *Kemp*:

But there is a deeper question. Did the common law give room for the exculpation of a man on the ground that through his mental condition at the time of the commission of the overt acts he was incapable of the requisite state of mind unless he made out what we now call a plea of insanity?⁵²

If this question was answered in the affirmative the result was the creation of a new and separate head of incapacity. 'Stated in another form, it is whether, in defiance of basal legal principle, a ground of exculpation has not been divided into two categories, separated quite arbitrarily and against principle, by nothing more than the misuse of the formula.'⁵³ The formula being the M'Naghten Rules. Dixon preferred a return to the pre 1843 law which he saw as a more principled approach to the question of criminal responsibility. The English Court of Appeal in *Sullivan* took a similar approach seeing advantages in the 'pre-1800 common law concept of insanity' which 'took in acts brought about through the absence of relevant brain function.'⁵⁴ However, the House of Lords in *Sullivan* held that it was not necessary to investigate 'the pre 1843 position'. The M'Naghten Rules applied "in all cases" in which it is sought "to establish a defence on the grounds of insanity".⁵⁵

Gresson P. echoed Dixon's concerns. In his opinion it was the nature of the M'Naghten rules which caused the problem. He made a sustained attack on the suitability of the rules for application to cases where lack of consciousness is claimed. 'It is commonplace that the

51 DIXON, O. 1957. p.259

52 DIXON, O. 1957. p.259

53 DIXON, O. 1957. p.261

54 [1983] 1 All ER 577, 581

55 [1983] 2 All ER 673, 676

M’Naghten Rules have never provided an adequate or satisfactory test in cases where the mentality of the accused shows some departure from the normal.’⁵⁶

With the passage of years, their application has become increasingly difficult in the light of modern knowledge and understanding, and because of the variety of forms of mental alienation, sometimes transient, which can occur negating volition. The law in making it essential to a finding of insanity that the mental condition of the accused should be such as not to understand the nature and quality of his act, or not to know that it was wrong has imposed positive tests which are difficult to apply where the mind of the doer of the act did not function in control of the action. It is almost impossible, and certainly highly unsatisfactory, to apply the principles which were formulated, to cases where there has been no consciousness of the act at all as in ‘blackout’, which is usually of short duration, or in cases in which there is some behaviour of which the doer is not conscious, commonly called ‘automatism’, which may extend over hours. ... We must accept the position as it is, but we cannot escape the difficulty that the M’Naghten Rules were never intended to apply to a case where the act was done without volition or consciousness of doing it.

Furthermore in his view there was no need to invoke the M’Naghten rules in such a case ‘since the absence of knowledge of doing an act is itself sufficient to negative intent.’⁵⁷ This is similar to the argument put forward by Sullivan’s counsel, rejected by the House of Lords, that functional impairment should not merit an insanity verdict, though counsel’s argument was based upon lack of an ‘act’ rather than lack of intent.

In considering what might constitute a ‘disease of the mind’, Gresson P. saw the length of the period of automatism suffered by an accused as relevant to whether the disability which causes the automatism should be classified as a disease of the mind. ‘The adverse effect upon the mind of something happening, e.g, a blow, hypnotism, absorption of a narcotic, or extreme intoxication all producing an effect more or less transitory cannot fairly be regarded as amounting to or as producing “disease of the mind”’.⁵⁸ Gresson P. does not draw attention to the fact that all of these effects might be regarded as a cause external to the accused.

For him the M’Naghten Rules applied in such cases if the conduct of the accused arose from a

56 [1958] NZLR 999, 1008

57 [1958] N.Z.L.R 999. Both quotations 1009

58 [1958] NZLR 999, 1011

disease of the mind - 'a term which defies precise definition and which can comprehend a mental derangement in the widest sense whether due to some condition of the brain itself and so to have its origin in the brain, or whether due to the effect on the brain of something outside the brain e.g. arteriosclerosis.' Where automatism was put forward as a defence then the court had to decide whether a finding of insanity based upon whether 'mental disease in some form or other is present.'⁵⁹ Therefore, Gresson P. saw medical evidence as playing an important role in the court's deliberations, where intent was part of the offence and the accused claimed it was absent:

because the accused had no consciousness of his action, there must be an acquittal unless the Crown in discharge of its onus of proof, satisfies the jury that the accused did act consciously and with volition. Mental dissociation from action can arise from various causes. If it 'appears on the evidence' that it arises from disease of the mind, a finding of insanity would be permissible.⁶⁰

North J. also considered Dixon's article and expressed his concern at the idea of a 'new and separate head of incapacity':

Now, however, it is asserted that it is competent for counsel for the prisoner to seek 'a complete and unqualified acquittal notwithstanding the fact that the prisoner relies on his mental incapacity to know the nature of his act', to quote the words of Sir Owen Dixon. This, it is said, can be achieved by the simple expedient of not pleading temporary insanity and relying on the statement of the law laid down in *Woolmington's* case, that it is the duty of the Crown to prove the existence of a criminal intent on the part of the accused. This is a rather startling proposition, and it seems to me to threaten the very foundation of the criminal law.⁶¹

The approach in England has been to accept that there is an automatism defence but to regulate that defence by subsuming it in large part into the insanity defence. Similarly, North J. saw epilepsy, the alleged cause of the criminal behaviour in the case which was the subject of appeal, as a disease of the mind. Referring to the detention of the insane he made the following comment concerning public safety:

59 [1958] NZLR 999, 1011. All quotations

60 [1958] NZLR 999, 1012-1013

61 [1958] NZLR 999, 1027

The object of s. 31 is not to punish the prisoner. In this country the verdict is still one of not guilty. The purpose of the section is to ensure that persons who commit crimes are not set free for what such a person has done he may do again if he is left at large. The public interest therefore requires that he should be detained. ⁶²

In North J.'s judgment the question of whether evidence of automatism raised issues of insanity was a 'question of law for the Judge.'⁶³ As to the matter of intent it might be possible for a defendant to demonstrate that he had not formed the specific intent necessary for a particular criminal offence. North J. considers the burden of proof in automatism cases and concludes that following *Woolmington* the defence might lead evidence regarding the defendant's state of mind at the time of the criminal act, 'without relieving the prosecution from the obligation to prove in the end all the facts necessary to establish guilt.'⁶⁴ However, the public interest required the question of whether the accused was insane to be considered where the nature of the evidence in the case required that it should be. Thus following *Cottle* the New Zealand courts accepted the possibility of a defence of automatism. The defence was seen as relying very much on the medical evidence presented. The New Zealand and English approaches are similar in viewing the public interest as requiring the issue of insanity to be taken into consideration when the defence of automatism is raised. This may be contrasted with the approach adopted by Lord Hope in *Ross*.

In *R v Burr*⁶⁵ the New Zealand Court of Appeal further considered the borderline between insanity and automatism. In looking at the cases where intent is a necessary ingredient for criminal liability North P. considered what must be established for a defence of automatism to succeed:

It is not sufficient that the medical evidence suggests that the appellant's mind was not fully functioning and that he had an imperfect appreciation of the nature and quality of his act. To allow such a plea to be submitted to a jury in a case like this would be dangerous in the highest degree. It would be quite contrary to the view the law has always adopted in the case of an insane person for he is liable unless he is able to meet

62 [1958] NZLR 999, 1029

63 [1958] NZLR 999, 1028

64 [1958] NZLR 999, 1026

65 [1969] NZLR 736

the tests laid down in the McNaghten rules, which ... are now enshrined in our Crimes Act. I think it should be made plain that when Lord Denning speaks of 'an act which is done by the muscles without any control by the mind', he does not mean that the accused person must be absolutely unconscious because you cannot move a muscle without a direction given by the mind. What his Lordship in my opinion was saying is that all the deliberative functions of the mind must be absent so that the accused person acts automatically.⁶⁶

By way of contrast in England it is not the presence of deliberative functions which has been considered but rather lack of consciousness. It is this stress on the deliberative capabilities of a defendant claiming automatism which has led to a distinctly different approach to the defence of automatism in New Zealand than that adopted in the other jurisdictions which have been researched for this thesis.

Further Developments in New Zealand case law.

The issue of automatism was again considered this time by the High Court in the case of *Police v Bannin*.⁶⁷ The defendant was tried and convicted of three charges of 'unlawfully entering a building with intent to commit crime therein and one of assault upon a female.' The defence case was that the accused lacked intent and thus he was a non-insane automaton. The basis of the claim was that Bannin committed the offences with which he was charged whilst suffering from Kleine-Levin Syndrome.⁶⁸ The trial judge had ruled that neither automatism or insanity were available to the defendant.

The judge in the High Court, Fisher J., was critical of the traditional approach to automatism. He concluded that the cause of the appellant's behaviour was internal, therefore if Bannin had an automatism plea it would be insane automatism. Having considered the English case of *R v*

⁶⁶ [1969] NZLR 736, 745

⁶⁷ [1991] 2 NZLR 237

⁶⁸ [1991] 2 NZLR 237, 241

'The accused suffered from a neurological disorder known as "Kleine-Levin Syndrome". Several times a year the accused would have periodic episodes of prolonged sleep and sleepiness. Each such period would be followed by a period of several days during which his behaviour would initially be abnormal but would progressively return to normal. The incidents in question occurred during one of these periods of abnormal behaviour.'

The disorder was one which Bannin would grow out of and therefore the risk of recurrence would reduce as he grew older

T,⁶⁹ where the plea was based on a dissociative episode following rape, he said: 'I think that while "unconscious involuntary action" will suffice as the test for obvious automatism cases, something more sophisticated will be needed for marginal ones.' Referring to *R v Burr* he commented that in New Zealand it was accepted that "total unconsciousness" is not necessary for the defence. It is sufficient if "all deliberative functions of the mind are absent". Fisher J. looked at the basis of the automatism defence in New Zealand and said:

In my view, the true foundation for automatism lies in the mental elements of the particular crime with which the accused is charged. The physical ingredients of the crime must be voluntarily performed (traditionally the 'actus reus') and there must also be those additional mental requirements of knowledge, belief, purpose, intention and/or recklessness necessary to complete the crime (traditionally the 'mens rea'). If the accused lacks the capacity to form any one of the mental elements necessary to the crime charged, the prosecution must fail, whether or not other definitions of automatism apply. Equally, if the accused displays those mental elements, then in my view qualification for 'automatism' in any other sense will avail him naught.

For this purpose I think it immaterial whether the mental deficiency relates to the actus reus or the mens rea or both.⁷⁰

He does not at this point seem to be proposing a test such as that employed in Scotland, of 'total alienation of reason', or Gresson P.'s test that 'all the functions of the mind must be absent.' What seems to be relevant in Fisher J.'s test is lack of capacity to form any one of the mental elements of the crime charged. This would seem to include states where there is some deliberative function. It is not clear what such an approach adds to the normal requirement that the Crown must prove its case. Unless Fisher J. is suggesting that voluntariness must be included within each of the mens rea categories. However his later reasoning suggests that this is not the case. He does stress that his test should only be used in marginal cases. The test he proposes links the concept of automatism in marginal cases to a test of three different types of capacity which Fisher J. examined in some detail:

First, he must have been capable of perceiving, bringing into his conscious mind, and considering, those aspects of reality which set the scene before and during the crime and which were essential to it. This is not awareness in the abstract. It is awareness of the particular facts essential to the crime charged. ... The mental capacity required for a

69 [1990] Crim LR 256

70 [1991] 2 NZLR 237, 250. All quotations

more complicated crime - eg uttering a forged document - would have been more taxing.⁷¹

From this it appears that Fisher J. is rejecting the approach of Lord Denning in *Bratty*, '[n]or is an act to be regarded as involuntary simply because it is unintentional or its consequences unforeseen.'⁷² This raises a problem with regard to 'actions' which occur through habit without conscious information processing but which have unintentional and unforeseen results. Fisher J. continued his description of automatism stating that the more complex the crime the more mental processes are involved. 'That is one of the reasons why the defence of automatism must be strongly anchored in the mental elements of the particular crime charged.' No justification is given for this reasoning. His second test is that:

... each of the actions constituting the crime had to be voluntary in the sense that it was preceded by a decision to take that action. Theoretically, a decision to act implies that the accused had the capacity to exercise several decision making functions. He must have been able to appreciate in advance - however momentarily - the possibility that he could act in the way which in fact followed. To decide to do something necessarily involves contemplation of the future. He must have had the capacity - not necessarily exercised - to contemplate the possibility of innocent alternatives. In the present case, he had to have the mental capacity to consider staying away from the complainant had that idea occurred to him. Only then could it be said that he had had the capacity to exercise a choice. He must have had the capacity to then convert the contemplated course of action into the mental commitment to proceed with it. Finally, he must have had the capacity to then issue the appropriate motor commands.⁷³

This description is somewhat removed from automatic acts being performed in an unconscious or partially conscious state. It seems to be an attempt to assess whether acts were purposeful. Describing what makes action purposeful is something to which philosophers have given much thought and leads back to the somewhat vexed question of free will. Fisher J. talks of the capacity to take decisions rather than the capacity to act. There is much debate concerning whether individual decisions to act are taken in the manner he described.⁷⁴

71 [1991] 2 NZLR 237, 252

72 *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 409

73 [1991] 2 NZLR 237. All quotations 252

74 For a discussion of what it means to 'act' see chapter 4 and more generally MOORE, M. 1993

He argues that a decision to act implies 'several decision making functions' and that the accused 'must have been able to appreciate in advance - however momentarily - the possibility that he could act in the way which in fact followed.' This may be an intuitive view of what it is to act. However, not every action involves a decision prior to acting. Habitual actions such as carrying out routine tasks may not involve conscious appreciation. However, they should be distinguished from the actions of the automaton. This is because the habitual actor if halted in the middle of the task would not find her action inappropriate. The capacity to control action still remains. Choice in this sense is more limited than that expressed by Fisher J.. He must have been able to appreciate in advance - however momentarily - the possibility that he could act in the way which in fact followed.' This description could permit the habitual actor, who did not consciously consider his action in advance, to claim automatism.

Thirdly and finally, before an accused could be found guilty he would have to have had the capacity to satisfy any other elements of the particular mens rea involved in the charge. In some cases, of which this assault charge is an example, that would add nothing to the awareness and decision-making capacities to which I have already referred. In others there will be additional requirements of intention, belief, purpose, recklessness or carelessness before the charge would be sustained. In the present case, the unlawful entry charge required the capacity to appreciate that the house belonged to someone else and also the capacity to form at the time of entry the ulterior intent of locating and assaulting the complainant.⁷⁵

The elements talked of here seem to be the mental elements required by the offence. According to Fisher J. the raising of evidence of automatism will not of itself be sufficient to avoid criminal liability in borderline cases. Fisher J. would apply his three tests in order to gauge whether the accused had sufficient capacity. Automatism is not being assessed in the abstract. In effect what is being asserted here is that the prosecution must prove all the mental elements of the crime, when the defence of automatism is raised. In this sense in borderline cases of automatism the definition is wider than the English test in that the court will proceed to examine whether automatism prevented the defendant from having mens rea in cases where the English court might reject the defence altogether.

However, the traditional automatism defence is fundamental precisely because there is no awareness of surroundings, circumstances or knowledge of bodily movements at the time of the

75 [1991] 2 NZLR 237, 252-3

offence. The idea that Fisher J.'s third test is dependent upon the variety of mens rea required for the offence which was committed, removes the core notion that voluntariness is fundamental to criminal liability. It requires that the test of automatism will vary according to the complexity of the mens rea requirement for the crime charged.

Fisher J. sees this as the strength of his approach:

A common way of approaching automatism is to define automatism itself, and then to see whether the accused falls within that preconceived definition, rather than to start with the mental elements of the crime charged and then to see whether the accused lacks the capacity to satisfy those elements in the instant case. In the finish, there should be no difference in the result. But I cannot help thinking that the debate over differing levels of consciousness, and the possibility of consciousness without voluntariness, has not been assisted by the tendency to concentrate upon automatism as though it had a life of its own. The ultimate question is not whether the case falls within a preconceived definition of automatism or is mentally incapacitated to some preconceived extent. There is little point in addressing mental states in the abstract. Automatism as a concept is no better than a negative and indirect route to the question that really matters. The question is whether the accused has retained sufficient mental capacity to reach the threshold required for the particular crime with which he is charged. That threshold will vary from one type of crime to another. It will be affected by the reasons for which a particular class of conduct was proscribed by the law, the implied statutory intention as to the level at which citizens should be held responsible for their conduct, and the way in which the law has defined the crime. In short, the focus should lie upon the elements of the charge.⁷⁶

On this view automatism ceases to play its traditional role in determining criminal liability and becomes a defence tied to diminished capacity. This could be contrasted with the approach in Scotland which requires 'total alienation of reason'. Therefore, in Scotland, the standard required of the defendant remains constant irrespective of the mens rea requirements of the offence with which she is charged. In Scotland the mens rea requirement of a crime only become relevant if the plea of automatism fails.

In terms of what might constitute a sufficient standard to fulfill the three tests of capacity. Fisher J. says:

So long as the accused had the capacity to exercise those three functions in some

76 [1991] 2 NZLR 237, 251

degree, I do not think any particular standard had to be achievable.⁷⁷

Fisher J. rejected any general diminished responsibility defence, and concluded that the defence of automatism is not available to Bannin. His decision revolved around the issue of intent. He narrowed the focus of the defence by excluding compulsive urges '[f]reedom of choice in the special sense that the mind is free from compulsive urges is not an essential element of intent. Its absence will not support the defence of automatism.' He concluded:

To summarise, the defence of automatism can be reduced to the question whether at the material time the accused had the mental capacity to form the particular mental ingredients of the crime with which he is charged. For this purpose, no distinction is to be drawn between sane and insane automatism. That distinction affects only the onus of proof and the ultimate disposition of the case. The mental ingredients of the crime will vary from one case to another but in every case the accused must have (i) some appreciation of each of the key facts relevant to the crime, (ii) some capacity to make a decision to act with respect to those facts and (iii) some capacity to form each of the residual mental elements of the particular mens rea involved. It will be no defence that those capacities might be severely impaired, that normal inhibitions might be absent or that there might be a compulsive urge to act in that way.⁷⁸

His discussion of automatism and intention is interesting in that it raises many of the issues which need to be considered, for example how should apparently purposeful acts be judged? But it also points to an underlying tension within the law as he expresses it. How is it possible, even hypothetically, that automatism may be relevant to unlawful entry and not to assault? If automatism excuses a defendant how can it be of a varying standard with regard to different offences committed at the same time? If automatism relates to absence of voluntariness this is not sustainable, either voluntariness is absent or it is not; the decision cannot be dependent on the offence committed. The New Zealand courts have referred to and employed the three part test in subsequent cases.⁷⁹ However, the third test as proposed by the New Zealand High Court seems to alter the basis of the automatism defence to the point that it is questionable whether in the cases which Fisher J. refers to as 'marginal' voluntariness remains fundamental to criminal liability.

⁷⁷ [1991] 2 NZLR 237. All quotations 254-5

⁷⁸ [1991] 2 NZLR 237. Both quotations 254

⁷⁹ *Keech v Pratt* [1994] 1 NZLR 65, and *Police v Henderson* [1997] DCR 520

The Australian and Canadian courts have had similar difficulties with cases where defendants have claimed an automatism defence, particularly when the defence is based upon automatism due to a dissociative state. The argument advanced here is that a psychological shock caused the defendant to dissociate. The claim is then made that such a shock is an external factor causing the accused to enter a state akin to automatism. It will be recalled that in England and Wales an automatism defence based on a severe shock was accepted by the trial judge but on the facts was rejected by the jury in *R v T*; and in *Hennessy* 'stress anxiety and depression' were not in themselves either separately or together 'capable in law of causing or contributing to a state of automatism.'

Canadian case law

In *Rabey* the Canadian Supreme Court considered psychological shock when hearing a claim of automatism by a student who had attacked a girl with whom he was said to be infatuated.⁸⁰ The court confirmed that the distinction in Canada was based upon whether the automatic episode had an external or internal cause. The defendant claimed that he was in a dissociative state due to the stress and disappointment occasioned by the manner of his rejection by the girl. Ritchie J. rejected this as an external cause of automatism and stated:

In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a 'disease of the mind'. To hold otherwise would deprive the concept of an external factor of any real meaning. In my view, the emotional stress suffered by the respondent as a result of his disappointment with respect to Miss X cannot be said to be an external factor producing the automatism within the authorities, and the dissociative state must be considered as having its source primarily in the respondent's psychological or emotional make-up. I conclude, therefore, that, in the circumstances of this case, the dissociative state in which the respondent was said to be constituted a 'disease of the mind'.⁸¹

In his dissenting judgment, Dickson J. expresses the same concern as that expressed by the English Court of Appeal in *Quick*, and states Canadian law requires as a matter of principle that

⁸⁰ *Rabey v The Queen* [1980] 2 SCR 513

⁸¹ [1980] 2 SCR 513, 520 reiterating the words of Martin J.A. on hearing *Rabey*'s case in the Ontario Court of Appeal

‘no person should be committed to a hospital for the criminally insane unless he suffers from disease of the mind in need of treatment or likely to recur.’⁸² In his view there was no indication that Rabey required such treatment. Dickson J. acknowledges that there are policy considerations when dealing with a defence based upon dissociation.

Automatism as a defence is easily feigned. It is said the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from a psychological blow. The argument is made that the success of the defence depends upon the semantic ability of psychiatrists, tracing a narrow path between the twin shoals of criminal responsibility and an insanity verdict. Added to these concerns is the *in terrorem* argument that the floodgates will be raised if psychological blow automatism is recognized in law.

There are competing policy interests. Where the condition is transient rather than persistent, unlikely to recur, not in need of treatment and not the result of self-induced intoxication, the policy objectives in finding such a person insane are not served. Such a person is not a danger to himself or to society generally.⁸³

In Dickson J.’s opinion there was nothing to support the view that Rabey’s dissociation had an internal cause. Also, as sanity was to be presumed, it was for the Crown to displace that presumption in the presentation of its evidence. ‘[I]t lay upon the Crown to establish that the appellant suffered from a disease of the mind at the time of the attack. The existence of the mental disease must be demonstrated in evidence. Here there is no such evidence from any of the expert or other witnesses with reference to the crucial period of the assault.’⁸⁴ He argued that the question as to whether a psychological blow was sufficient to cause a state of automatism was a question of fact to be left to the jury.

Dickson J. objects to the internal/external distinction made by Martin J.A. in the Ontario Court of Appeal when hearing the appeal against Rabey’s acquittal by the court of first instance.

It is not clear to me why, as a matter of law, an emotional blow, which can be devastating, should be regarded as an external cause of automatism in some circumstances and an internal cause in others, as ... [Martin J.A.] would seem to

82 [1980] 2 SCR 513, 546

83 [1980] 2 SCR 513, 546-7

84 [1980] 2 SCR 513

propose in this passage:

‘... I leave aside until it becomes necessary to decide them, cases where a dissociative state has resulted from emotional shock without physical injury, resulting from such causes, for example, as being involved in a serious accident although no physical injury has resulted; being the victim of a murderous attack with an uplifted knife, notwithstanding the victim has managed to escape physical injury; seeing a loved one murdered or seriously assaulted, and the like situations. Such extraordinary external events might reasonably be presumed to affect the average normal person without reference to the subjective make-up of the person exposed to such experience.’

I cannot accept the notion that an extraordinary external event, i.e. an intense emotional shock, can cause a state of dissociation or automatism, if and only if all normal persons subjected to that sort of shock would react in that way. If I understand the quoted passage correctly, an objective standard is contemplated for one of the possible causes of automatism, namely, psychological blow, leaving intact the subjective standard for other causes of automatism, such as physical blow, or reaction to drugs.⁸⁵

The essence of Dickson’s argument seems to be that if automatism is raised in evidence, then what is in question is whether the defendant was an automaton and not some objective standard at which automatism might normally be said to occur. There are problems for the courts however, not only in framing a legal definition of automatism but also because of the policy difficulties which surround the defence. This is a question which has been faced by the courts in Australia as well as Canada. Additionally there is the question of what should be done with a defendant whose dissociation is separated from the event that caused the dissociation or if the dissociation and behaviour associated with it recurs. If someone with a potential to dissociate does so frequently then should the defence of automatism be available to them with the ensuing acquittal?⁸⁶

Australian case law

In the Australian case of *Falconer*,⁸⁷ the defendant was a woman who had killed her husband. She claimed that these events happened whilst she was in a dissociative state. There was

85 [1980] 2 SCR 513, 548

86 For discussion of the problems surrounding psychological blow automatism see MACKAY, R.D. 1995. p.51-62

87 *Queen v Falconer* (1990) 171 CLR 31

evidence presented at trial that her husband had abused her and their children, and that he had sexually assaulted her on the day on which she killed him.

The relevant law was contained in the Western Australian Criminal Code. Section 23 stated 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will'. Section 26 provided 'Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved'. And s 27 stated that 'A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission'. The question before the Australian High Court was whether evidence relating to the voluntariness of her actions should have been considered by the court of first instance as supporting the assertion that the shooting had 'occurred independently of her will' and thus satisfied s 23 of the Criminal Code. The High Court was asked to determine how the common law related to the Western Australian Criminal Code.⁸⁸ The Crown argued that in Falconer's case s 23 related to s 27 via the medium of s 26. Thus in effect the presumption of sanity expressed in s 26 could only be displaced by evidence of unsoundness of mind. On the basis of *Rabey* the Crown argued that where the blow was external, as in concussion, a defence of automatism was available, but where the cause of the blow was internal to the accused the only defence was disease of the mind.⁸⁹

The decision of the court was unanimous as to the ordering of a retrial of Falconer. They were also in agreement as to the existence of a defence of sane automatism⁹⁰ under s 23 of the

88 Before this Court, those questions were formulated by the Crown in the following way: '(a) whether involuntary acts performed in a state of dissociation resulting from emotional tension are excused by virtue of the operation of s. 23 of the *Criminal Code* (W.A.); (b) the relationship between ss. 23, 26 and 27 of the *Criminal Code* where the normal functioning of the mind is disturbed by emotional tension; and (c) the application to the *Criminal Code* of common law decisions dealing with automatism and insanity as they affect criminal responsibility.' *Queen v Falconer* (1990) 171 CLR 31, 65 (Toohey J.) For a case commentary see ELLARD, J. 1995. Some Notes on Non-insane Automatism and the Will. (1995) 69 *ALJ* 833-41

89 (1990) 171 CLR 31, 33

90 In *Falconer* automatism is referred to both as sane or insane automatism (1990) 171 CLR 31, 55 and as non-insane and insane automatism (1990) 171 CLR 31, 77 depending upon which of the judges was giving judgment

Western Australian Criminal Code. But, three of the judges, a minority, favoured the introduction of an objective test based on soundness of mind in cases of psychological blow automatism. These judges,⁹¹ having considered Lord Lane's comments in *Hennessy*⁹² stated: 'there seems to be no reason in principle why psychological trauma which produces a transient non-recurrent malfunction of an otherwise sound mind should be distinguished from a physical trauma which produces a like effect. That was the view of the minority in *Rabey*.'⁹³ However, this acceptance of a psychological blow as a trigger to automatism was strictly limited, in their view, to cases where the mental malfunction was 'transient', the defendant's mind 'otherwise sound', the cause 'trauma' and the 'malfunction is not likely to recur'.⁹⁴ The problem of distinguishing between an unsound and sound mind was discussed and the internal/external test was not utilised. The same three judges wanted to place a restriction on the availability of the defence by applying a reasonable man test to the tendency of the defendant to dissociate.

The problem of classification in a case of a transient malfunction of the mind precipitated by psychological trauma lies in the difficulty in choosing between the reciprocal factors — the trauma and the natural susceptibility of the mind to affection by psychological trauma — as the cause of the malfunction. Is one factor or the other the cause or are both to be treated as causes? To answer this problem, the law must postulate a standard of mental strength which, in the face of a given level of psychological trauma, is capable of protecting the mind from malfunction to the extent prescribed in the respective definitions of insanity. That standard must be the standard of the ordinary person: if the mind's strength is below that standard, the mind is infirm; if it is of or above that standard, the mind is sound or sane. This is an objective standard which corresponds with the objective standard imported for the purpose of determining provocation.⁹⁵

It was the idea of this type of test that Dickson J. found so problematic in *Rabey*. Particularly as no such objective test was applied to other types of automatism.

Deane and Dawson JJ. agreed with Toohey J. that there was sufficient evidence to raise the

91 Mason C.J., Brennan and McHugh JJ.

92 *R v Hennessy* [1989] 1 WLR 287, 294

93 *Queen v Falconer* (1990) 171 CLR 31, 54

94 (1990) 171 CLR 31, 54 (Mason C.J., Brennan and McHugh JJ.)

95 (1990) 171 CLR 31, 55

question of voluntariness under the Western Australian Criminal Code. Toohey J. in his separate judgment addressed the issue raised by the Crown that the cause of Falconer's behaviour was primarily internal and thus a malfunction of the mind and concluded that there was no evidence which would bring her within the ambit of section 27 of the Western Australian code. '[U]nless it be open to argument that to be deprived of capacity to control one's actions through a dissociative state is itself evidence of a state of mental disease.'⁹⁶ Later in his judgment he said, 'there is no reason why shock cannot be the product of an emotional blow as much as the result of some external physical force.'⁹⁷

In his judgment Toohey J., expressed strong doubts about the use of external and internal factors as a test of insanity: '[t]he application of the "external factor" test is artificial and pays insufficient regard to the subtleties surrounding the notion of mental disease. As well, there is confusion in the idea of an external factor. A physical blow will readily answer that description.'⁹⁸ For Toohey J. this did not explain why an externally caused shock could not precipitate automatism. He adopted the argument made by King C.J. in *Radford* who stated that:

There is no reason in principle for making a distinction between disturbance of the mental faculties by reason of stress caused by external factors and disturbance of the mental faculties caused by the effects of physical trauma or somnambulism. The significant distinction is between the reaction of an unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to external stimuli, including stress producing factors, on the other hand. I appreciate that if it is true that a state of depersonalization or dissociation is not itself a disease of the mind, although it may result from mental illness, the result may be that certain cases of unwilled acts which would formerly have been treated as the result of temporary insanity and would have founded verdicts of not guilty on the ground of insanity, will now result in outright acquittals. I do not see any reason to shrink from that consequence. The consequence of a verdict of not guilty by reason of insanity is detention during the Governor's pleasure. If a person was not morally responsible for the action which is the subject of the charge because that action was an unwilled automatic act, he should not suffer conviction or punishment. If he is not mentally ill and there is therefore no reason to suppose that the act will be repeated, detention for the protection of others is

⁹⁶ (1990) 171 CLR 31, 71

⁹⁷ (1990) 171 CLR 31, 73

⁹⁸ (1990) 171 CLR 31, 75-6

pointless and an embarrassment to the mental health authorities.⁹⁹

Toohy J. saw this as 'the approach dictated by the relevant provisions of the Code'¹⁰⁰. Thus '[d]issociation may warrant a conclusion that the act or omission in respect of which an accused is charged occurred independently of his or her will.'¹⁰¹ Such a conclusion in the case of Falconer led to her acquittal under section 23 of the Western Australian Criminal Code. However, if a jury were to accept that the Crown 'had disproved, beyond reasonable doubt non-insane automatism', it may be because the acts 'were the involuntary product of an unsound mind' in which case then the issue of soundness of mind must be considered. When a jury reached this conclusion then consideration should be given to whether 'the accused had proved on, the balance of probabilities, insanity within the meaning of s.27'.¹⁰²

Deane, Dawson, Gaudron and Toohy, JJ. were agreed that under s 23 of the code the onus of disproving the defendant's case rested with the Crown once evidence of involuntariness had been raised. The minority took the view that the onus of proof of voluntariness only rested with the prosecution where the 'malfunction of the mind' was '(1) transient (2) caused by trauma ... (3) not prone to recur' otherwise the malfunction was due to 'mental infirmity'. Mental infirmity must be proved by the defendant on 'the balance of probabilities at the outset.' Once proved the burden of proof should then revert to the prosecution. Otherwise the only defence available to the defendant would be insane automatism. In the minority's view this did not concern principles of criminal liability because the issue 'is not one of criminal liability but the cause of the condition which deprived the accused of criminal responsibility.'¹⁰³

This last claim seems disingenuous to say the least, as Fairall points out:

to suggest the issue 'is not one of criminal responsibility' is untenable. Certainly the issue relates to a stage in the inquiry which requires classification of the cause of

99 (1990) 171 CLR 31, 76-77. Quoting from *R v Radford* (1985) 42 SASR 266, 276

100 (1990) 171 CLR 31, 76

101 (1990) 171 CLR 31, 77

102 (1990) 171 CLR 31, 77. All quotations

103 (1990) 171 CLR 31, 56. All quotations

automatism (as sane or insane). But the classification may well determine the admissibility of evidence bearing upon the issues of intention and voluntariness. It is therefore directly relevant to criminal responsibility.¹⁰⁴

Whilst Mason C.J., Brennan and McHugh JJ. favoured an objective test of soundness of mind the majority of the judges favoured a test based on soundness of mind. McSherry argues that this is 'rather more sophisticated than the internal/external distinction.' She later admits 'the main problem ... lies in distinguishing between the reaction of an unsound mind and that of a sound mind.'¹⁰⁵ This would seem to be an echo of the problems in English law in determining what might constitute disease of the mind. Gaudron J. also seems to favour a test to distinguish abnormal behaviour in normal persons from abnormal behaviour in persons of unsound mind:

In general terms, a recurring state which involves some abnormality will indicate a mind that is diseased or infirm, but the fundamental distinction is necessarily between those mental states which, although resulting in abnormal behaviour, are or may be experienced by normal persons (as, for example and relevant to the issue of involuntariness, a state of mind resulting from a blow to the head) and those which are never experienced by or encountered in normal persons.¹⁰⁶

The validity of the defendant's claim of involuntariness seems, in his view, to be based on whether such mental states as the accused may claim are experienced by normal persons. In Australia the test as to soundness of mind, in dissociative states is objective.¹⁰⁷ Therefore the Australian test has to answer the further problem raised by Dickson J. 'I cannot accept the notion that an extraordinary external event, i.e. an intense emotional shock, can cause a state of dissociation or automatism, if and only if all normal persons subjected to that sort of shock would react in that way'¹⁰⁸.

One argument which has been put forward to justify the soundness of mind test is that in fact

104 FAIRALL, P.A. 1993. Voluntariness, Automatism and Insanity. (1993) 17 *Crim LJ* 81-96 p.91

105 McSHERRY, B. 1998. Getting Away with Murder? (1998) 21 *International Journal of Law and Psychiatry*, 163-176. Both quotations p.173

106 (1990) 171 CLR 31, 85

107 For discussion of this see McSHERRY, B. 1998. p.173

108 *R v Rabey* [1980] 2 SCR 513, 548

the objective test of soundness of mind is only relevant once it is decided that the defendant is not criminally responsible for his actions. Yeo argues that in Australia the test is utilised to determine 'whether the accused should be acquitted or receive a special verdict and thereby be subject to compulsory medical treatment.'¹⁰⁹ In this sense, Yeo sees the objective test as a measure of self control similar in form to the objective test used to assess the validity of a provocation defence. He feels the 'invocation' of the 'ordinary person test' in cases of automatism provides a 'material advantage'. 'The test imposes a rather formidable obstacle to a successful plea of sane automatism since the accused is measured against a person of ordinary self-control or temperament.'¹¹⁰

This may in Yeo's view be a 'material advantage', but it does not answer Dickson's argument. Additionally it does not sufficiently recognise the distinction between the two defences a point taken up by Fairall. He argues that '[p]rovocation and automatism are quite distinct defences relating to quite different impairments of the will. ... A loss of self-control (as in provocation) does not imply a loss of the capacity for self-control (as in automatism).' Fairall expresses an additional concern about the difficulties of applying such a test in a courtroom: 'the introduction of an objective standard must lead to the greater complication of jury trials. It requires a distinction to be drawn between evidence relevant to whether automatism occurred, and evidence relevant to whether an ordinary person would have experienced such a state. Some of the factors relevant to the ordinary person test would be relevant to the question of automatism'.¹¹¹

It is argued that the test of involuntariness does not need further and ever more complicated layers added to determining the guilt or innocence of the accused; but rather a simply expressed test which allows a determination of whether the accused is criminally responsible. Whilst soundness of mind may be a more sustainable concept than disease of the mind it will not remain so if the means of assessing soundness of mind become ever more complicated. Again the fundamental problem is that the courts seek to control the defence because of policy factors.

109 YEO, S. M. H. 1992. Power of Self Control in Provocation and Automatism. (1992) 14 (3) *Sydney Law Review* 3-22, p.4

110 YEO, S. M. H. 1992. p.4. All quotations

111 FAIRALL, P.A. 1993. All quotations p.88

The most obvious example of the influence of policy on definitions of mental disorder is the recent Supreme Court of Canada decision concerning automatism.

Subsequent developments in the case law of Canada

In *R v Stone*¹¹² the Canadian courts reviewed the operation of the automatism defence. The appeal to the Canadian Supreme Court was against the trial judge's ruling that the only defence open to the defendant was insane automatism. The accused had killed his wife. Stone claimed that his wife had verbally abused him for most of the day prior to the killing. His defence was threefold. Firstly that he was suffering from non-mental disorder automatism or secondly he was suffering from mental disorder automatism or thirdly that he should be allowed to plead provocation. The jury accepted the plea of provocation and Stone was convicted of manslaughter. He appealed to the Canadian Supreme Court on the grounds, inter alia, that the defence of non-mental disorder automatism should have been left to the jury.

Of the nine judges sitting in judgment four concurred with the majority judgment given by Bastarache J..¹¹³ He concluded that the defence of automatism described 'a state of impaired consciousness, rather than unconsciousness, in which an individual though capable of action, has no voluntary control over that action.'¹¹⁴

Bastarache J. investigated the possibility of a single approach to all claims of automatism. He rejected differing standards for different types of automatism, 'because there may be cases where the facts are simply not conducive to such strict categorization.'¹¹⁵ He adopted La Forest J.'s two tasks for trial judges from *R v Parks*.¹¹⁶ 'First, he or she must assess whether a proper foundation for a defence of automatism has been established.' Then 'if a proper evidentiary foundation has been established, the trial judge must next determine whether the condition

112 (1999) 134 CCC (3d) 353

113 L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. concurred

114 (1999) 134 CCC (3d) 353, 417

115 (1999) 134 CCC (3d) 353, 419

116 [1992] 2 SCR 871

alleged by the accused is mental disorder or non mental disorder automatism.¹¹⁷

He continued: ‘voluntariness, rather than consciousness, is the key legal element of automatistic behaviour’.¹¹⁸ This led him to review the burden of proof with relation to the assertion that the accused’s act was involuntary. Bastarache J., with the support of the concurring judges then proceeded to change the burden of proof required to be met by the defence to establish that an accused’s action was voluntary. The burden henceforth would be removed from the prosecution and placed on the defence to prove involuntariness on the balance of probabilities. This was the view of the minority in Falconer. In his judgment this reflected ‘the policy concerns which surround claims of automatism.’¹¹⁹ He continued with his argument:

The law presumes that people act voluntarily in order to avoid placing the onerous burden of proving voluntariness beyond reasonable doubt on the Crown. Like extreme drunkenness akin to automatism, genuine cases of automatism will be extremely rare. However, because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting a legal burden on the accused to prove involuntariness on a balance of probabilities is necessary to further the objective behind the presumption of voluntariness. In contrast, saddling the Crown with the legal burden of proving voluntariness beyond a reasonable doubt actually defeats the purpose of the presumption of voluntariness.¹²⁰

The tenor of the judgment is that because automatism is ‘easily feigned’, policy reasons require the imposition of the change in the burden of proof. There is a strong dissenting judgment which will be considered, but this statement by Bastarache J. moves voluntariness in the Canadian defence away from having a fundamental role in determining criminal liability and treats it as a matter to be pleaded by the accused as a defence in the same manner as mental disorder. He said that this was because there was no justification for relegating policy considerations to the ‘second stage of the automatism analysis to determine whether the condition alleged by the accused was mental disorder or non-mental disorder automatism.’ It seems that Bastarache J. was less concerned with the underlying determinants of criminal

117 (1999) 134 CCC (3d) 353, 419

118 (1999) 134 CCC (3d) 353, 421

119 (1999) 134 CCC (3d) 353, 423

120 (1999) 134 CCC (3d) 353, 425

responsibility than with the possibility that an automatism claim might be feigned. He seems to view the presumption of voluntariness as existing solely to assist the prosecution with their case. If he is right it seems odd that it is normally viewed as a rebuttable presumption. The Canadian Supreme Court in *Parks* took precisely the opposite view stating: '[o]ur system of justice is predicated on the notion that only those who act voluntarily should be punished under the criminal law.'¹²¹ This seems the more correct view and is supported by Fairall's comments, regarding the minority judgment in *Falconer*, 'to suggest the issue is not one of criminal responsibility is untenable.'¹²²

Bastarache J. provides his own framework for the assessment by the jury of expert evidence:

In particular, when determining whether the evidentiary burden for automatism has been satisfied, trial judges must be careful to recognize that the weight to be given to expert evidence may vary from case to case. If the expert testimony establishes a documented history of automatistic-like dissociative states, it must be given more weight than if the expert is simply confirming that the claim of automatism is plausible. In the former case, the expert is actually providing a medical opinion about the accused. In the latter case, however, the expert is simply providing an opinion about the circumstances surrounding the allegation of automatism as they have been told to him or her by the accused. Trial judges must keep in mind that an expert opinion of this latter type is entirely dependent on the accuracy and truthfulness of the account of events given to the expert by the accused.¹²³

This framework considerably increases the burden of proof on the accused. A defendant must prove a negative, that is on the balance of probabilities her actions were involuntary, in the sense of not voluntary. Expert evidence given to support her case must be given less weight when it is simply confirming that a claim 'of automatism is plausible.' The defendant who claims automatism as a defence to a crime which is unwitnessed and who has no medical history to support the defence should in the view of the majority of the court find it more difficult to gain an acquittal. Yet there have been documented cases where people who have not previously suffered from automatism lapse into an automatic state. *Mansfield v Weetabix*¹²⁴ is one such

¹²¹ *R v Parks* [1992] 2 SCR 871, 874

¹²² FAIRALL, P.A. 1993. p.91

¹²³ (1999) 134 CCC (3d) 353, 427

¹²⁴ See chapter 2 p.74-5

case. Indeed in *MacLeod v Mathieson*¹²⁵ the success of an automatism defence in a driving case was dependent upon the fact that the accused was not aware that he was likely to lapse into an unconscious state. This seems the exact opposite of Bastarache J.'s argument.

However Bastarache J. continued:

The defence must make an assertion of involuntariness and call expert psychiatric or psychological evidence confirming that assertion. However, it is an error of law to conclude that this defence burden has been satisfied simply because the defence has met these two requirements.¹²⁶

The trial judge needs to be satisfied that there is evidence on which a jury could conclude on the balance of probabilities that 'the accused acted involuntarily'.¹²⁷ Proving involuntariness on the balance of probabilities will not of itself be sufficient to found a defence. Bastarache J. observes that '[p]olicy considerations are important in determining the sufficiency of evidence that is required to satisfy [evidential burdens] in both criminal and civil proceedings'.¹²⁸ Thus Bastarache J. introduces a further consideration before the defence can be considered 'the nature of the alleged automatism trigger'. This leads Bastarache J. to make further comments as to the type of evidence which should be required by the trial judge to support an automatism claim:

The burden will only be met where the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In reaching this conclusion, the trial judge will first examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The trial judge will also examine all other available evidence, if any. Relevant factors are not a closed category and may, by way of example, include: the severity of the triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatistic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence.¹²⁹

1251993 SCCR 488

126 (1999) 134 CCC (3d) 353, 430

127 (1999) 134 CCC (3d) 353, 430

128 (1999) 134 CCC (3d) 353, 427

129 (1999) 134 CCC (3d) 353, 430

A further hurdle for the potential defendant is introduced here in that any motive will also be examined in determining his involuntariness. If there is a clear motive for a crime any defence may well be more difficult to establish. It is not clear why Bastarache J. chooses to stress motive in relation to automatism in determining involuntariness. Particularly as, if an automaton is acting without in Fairall's words 'the capacity for self control', then motive cannot be relevant to an assessment of her actions. The requirement for motive to be assessed in this way seems to stem from the majority of the court's distrust of the automatism defence, 'automatism is easily feigned.'¹³⁰ Though this has been stated in a number of judgments it is questionable whether this is true. The number of acquittals on the basis of the defence is not known because of lack of records. It would be equally as true to say of any defence where the accused was the only witness to the crime and his defence rested on his testimony that the defence might be feigned. Duress and self defence would often fall within this category as might evidence of provocation.

Bastarache J. then considered how the distinction between mental disorder and non-mental disorder automatism should be made. He did this to assist trial judges in determining which type of automatism should be put to the jury once the first two tests have been fulfilled. Bastarache J. started from a presumption that mental disorder would be the cause of most automatisms. He did not wish to go so far as to 'eliminate the defence of non-mental disorder automatism'. He took 'judicial notice that it will only be in rare cases that automatism is not caused by mental disorder.'¹³¹ This reasoning 'lends itself to a rule that trial judges start from the proposition that the condition the accused claims to have suffered from is a disease of the mind.'¹³² Bastarache J. then considered factors which might remove a defendant from this category. The arguments relating to determinations of mental disorder in his view fell under three headings.

The first being internal cause theory, for this he adopted the majority's argument in *Rabey* regarding dissociative states caused by severe shock. He concluded, '[i]n effect the trial judge must consider the nature of the trigger and determine whether the normal person in the same circumstances might have reacted to it by entering an automatistic state, as the accused claims

130 (1999) 134 CCC (3d) 353, 425

131 (1999) 134 CCC (3d) 353, 432. Both quotations

132 (1999) 134 CCC (3d) 353, 433

to have done.’¹³³ Bastarache J. does not recommend this approach for all cases but he does not limit it to cases which concern dissociative states. Here he is imposing in Canada a wider objective test of soundness of mind than that imposed by the court in the Australian case of *Falconer*. In utilising a soundness of mind test Bastarache J. saw context as important and adopted the reasoning of the majority of the Australian court in *Falconer*.¹³⁴ Thus according to Bastarache J. the test of soundness of mind was relevant to establishing what type of automatism must be put by the trial judge to the jury. However, he does not see the internal cause theory as finally determinative and says that ‘it is only an analytical tool.’¹³⁵

His second argument fell under the heading, ‘The Continuing Danger Theory’. ‘This theory holds that any condition that is likely to present a recurring danger to the public should be treated as disease of the mind.’ This theory was linked to a risk of recurrence of violence but, ‘a finding of no continuing danger does not preclude a finding of a disease of the mind.’¹³⁶ Both of these two theories were relevant to determinations by the trial judge as to whether disease of the mind existed. Therefore they should both be considered as factors when considering which type of automatism should be put to the jury.

In assessing the continuing danger factor two issues were relevant: ‘the psychiatric history of the accused and the likelihood that the trigger alleged to have caused the automatistic episode will recur.’ Risk of recurrence of violence was ‘heightened by the fact that at least one of the accused’s automatistic episodes involved violence.’ In these cases the accused’s condition is ‘likely to be classified as disease of the mind.’ Again an absence of a history of dissociative states was not to be taken as indicating ‘there will be no recurrence of violence.’¹³⁷ There is no suggestion that either the severity of the violence, or the length of time since it occurred, or the actual risk of recurrence is relevant to the trial judge’s decision once some evidence is produced

133 ‘In cases involving claims of psychological blow automatism, evidence of an extremely shocking trigger will be required to establish that a normal person might have reacted to the trigger by entering an automatistic state, as the accused claims to have done.’ (1999) 134 CCC (3d) 353, 436

134 (1999) 134 CCC (3d) 353, 436

135 (1999) 134 CCC (3d) 353, 438 reiterating the same statement made by La Forest J. in *Parks* [1992] 2 SCR 871, 902 & 903

136 (1999) 134 CCC (3d) 353, 438. Both quotations

137 (1999) 134 CCC (3d) 353 439. All quotations

that violence has occurred. In assessing the risk of the violence, the frequency of the recurrence of the trigger which caused the automatism, 'or of a similar one of at least equal severity' is relevant. The greater the risk of recurrence the more likely it was that the automatism should be considered disease of the mind. Finally as a third category of factors to be considered a trial judge might consider any policy factor relevant to 'whether society requires protection from the accused'.¹³⁸ This approach seems to widen the categories of policy which may be relevant so as potentially to include issues other than public safety.

According to the majority in *Stone*, the burden of proving involuntariness rested on the accused. In giving instructions to the jury the trial judge 'should begin by reviewing the serious policy factors which surround automatism, including claims about feignability and the repute of the administration of justice.' He should also refer to the 'severity of the triggering stimulus', witness or medical evidence supporting the accused's case, 'whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence.'¹³⁹

Thus in Canadian law the burden on the prosecution of proving their case has been considerably lightened in cases of non-mental disorder automatism. This has been achieved by requiring the defence to prove that the accused's actions were involuntary on the balance of probabilities. This was necessary, according to the majority in *Stone*, for policy reasons because the protection of the public required that criminal liability be altered in such a manner and because automatism was a defence which according to Bastarache J. was easily feigned. To support this argument Bastarache J. gives weight to the views of the Canadian Psychiatric Association that 'automatism necessarily stems from mental disorder'. The Association recommended that 'non-mental disorder automatism be eliminated'. Whilst not totally accepting the proposal he took note that 'it will only be in rare cases that automatism is not caused by mental disorder.'¹⁴⁰

The four dissenting judges were strongly against the approach of the five judges who formed the majority in the Supreme Court. Binnie J. giving judgment on their behalf comments, 'the

138 (1999) 134 CCC (3d) 353, 440-1. All quotations

139 (1999) 134 CCC (3d) 353, 441. All quotations

140 (1999) 134 CCC (3d) 353, 432. Both quotations

elastic concept of “mental disorder” can be expanded to the point where it ceases to have any utility for classification.’ Therefore a legal perspective needed to give the term ‘some substantive content’.¹⁴¹ Binnie J. adopted the approach suggested by Williams:

The courts should eschew any effort to discourage the defence of dissociation by interpreting it as evidence of insanity, or by withholding psychiatric evidence from the jury. The defence, if supported by medical evidence, should be adjudicated upon by the triers of fact, and if successful should result in an ordinary acquittal. But what is urgently needed is that the psychiatrist who deposes to dissociation in improbable circumstances should be subjected to skilled and deeply sceptical cross-examination, and that the Crown should where possible, call counter-evidence.¹⁴²

This approach varies considerably from that adopted by the majority of the court. Yet it very nearly prevailed, four judges, including the Canadian Chief Justice, disagreed with the approach taken by the majority.¹⁴³ Binnie J. begins the minority judgment by pointing out that: ‘A fundamental principle of the criminal law is that no act can be a criminal offence unless it is performed or omitted voluntarily.’¹⁴⁴

The dissenting judges feel that one of the difficulties is that some judges are concerned ‘that juries may be too quick to accept the story of an accused that he or she doesn’t remember what happened, or that the conduct was ‘uncontrollable’, or some other feigned version of events.’¹⁴⁵ Binnie J. then makes an extremely pertinent point ‘[a] concern that a jury may fall into error is no basis for taking away its jurisdiction.’¹⁴⁶ What was essential to prevent fabrication was expert medical evidence. The trial judge accepted the defence evidence that Stone was unconscious ‘throughout the commission of the crime’ was supported by medical evidence which stated that ‘the appellant suffered from no underlying pathological condition which pointed to a disease requiring detention and treatment.’ Where there was no evidence from bystanders in support of

141 (1999) 134 CCC (3d) 353, 391. Both quotations

142 (1999) 134 CCC (3d) 353, 391: quoting from WILLIAMS, G. 1983. *Textbook of Criminal Law*. (2nd edit.). London: Stevens p.676

143 Binnie J. gave judgment. Lamer C.J.C., Iacobucci and Major JJ. concurred in dissent

144 (1999) 134 CCC (3d) 353, 366

145 (1999) 134 CCC (3d) 353, 374

146 (1999) 134 CCC (3d) 353, 375

the accused's case Binnie J. preferred an approach which dealt with the evidence as it was presented 'warts and all.' '[T]he assessment of the credibility of the defence is up to the jury.'¹⁴⁷

The dissenting judgment expresses the view that the issue of burden of proof was not raised by the appeal, non-mental disorder automatism not having been considered at the trial, its consideration having been excluded by the trial judge.¹⁴⁸ Additionally the alteration of the burden of proof from an evidential to a persuasive burden ran contrary to previous Canadian case law.¹⁴⁹ 'It was a response to a policy initiative put forward by the Minister of Justice'.¹⁵⁰ The dissenting judgment is extremely critical of the court's decision to alter the burden on the following grounds:

Parliament has not seen fit to act on this recommendation. I do not believe, with respect, that the court ought to take it upon itself to reverse the persuasive burden to the disadvantage of the accused simply because the Court may find an unenacted policy initiative more attractive than the established law. ... neither the respondent nor any of the Attorneys General who intervened in the appeal (Canada, Ontario, and Alberta) suggested that such a change of onus was either desirable or necessary.¹⁵¹

Binnie J. supports the decisions in the authorities on automatism prior to *Stone*, in particular the judgments of La Forest J. in *Parks*¹⁵² and Lamer C.J.C., La Forest J. and Cory J. in *Daviault*.¹⁵³

147 (1999) 134 CCC (3d) 353, 375-376. All quotations

148 (1999) 134 CCC (3d) 353, 382

149 (1999) 134 CCC (3d) 353, 383. *Parks* and *Rabey* are cited

150 Referred to as Proposals to Amend the Criminal Code (general principles). Healy comments on the use of this white paper 'A word about this White Paper is in order. No Minister of Justice has committed the Government of Canada to a policy that the accused should bear the legal burden on non-insane automatism. The white paper went nowhere and it was followed by two subsequent initiatives concerning the reform of the General Part of the criminal law. Neither of these has led to legislation, but it is more important to note that in one of them there was no mention of a reverse burden of proof on automatism and in the other the option for a reverse burden was one option among several. HEALY, P. 2000. Automatism Confined. (2000) 45 *McGill LJ* 87-105, p.104

151 (1999) 134 CCC (3d) 353, 384

152 *R v Parks* [1992] 2 SCR 871 'Automatism occupies a unique place in our criminal law system. Although spoken of as a 'defence', it is conceptually a sub-set of the *voluntariness* requirement, which is in turn part of the *actus reus* component of criminal liability.' (La Forest). Emphasis added in *Stone* (1999) 134 CCC (3d) 353, 376

153 *R v Daviault* [1994] 3 SCR 63

In *Daviault* the fundamental nature of the voluntary act was confirmed: '[t]he term *mens rea*, properly understood, does not encompass all of the mental elements of a crime. *The actus reus has its own mental element; the act must be the voluntary act of the accused* for the *actus reus* to exist'¹⁵⁴ It was accepted that in some cases automatism could relate to *mens rea*.¹⁵⁵ In explaining the legal use of the term unconscious Binnie J. says that: 'unconsciousness is used in the sense that the accused like the sleepwalker, is shown "not to have known what he is doing". This excludes the person who is provoked and says, "I couldn't help myself", or who simply professes to be at a loss to explain uncharacteristic conduct'.¹⁵⁶ In Binnie J.'s view therefore consciousness is relevant to voluntariness. Partial consciousness may be relevant where the 'semi consciousness' was 'a state of diminished awareness that negated control.'¹⁵⁷

On this basis, the minority believed that there was no reason why a court should not consider a defence of non-mental disorder automatism when the triggering event caused a dissociative state. In *Parks* the court's use of the external/internal distinction was not seen as determinative of which category of automatism was to be put to the jury. However, the concept was stated to be useful as an analytical tool.¹⁵⁸ Binnie J. argued that this was the correct approach. Mental disorder was a legal not a medical category. He explained that the internal/external distinction was limited in its application in that it could not provide a definitive test of whether a defendant was mentally disordered at the time of the crime.¹⁵⁹ His view was that once a judge had 'exercised his gatekeeper functions to screen frivolous or feigned claims, it was for the jury to make its mind up on the credibility of the plea of automatism. This jurisdiction should not be

154 (1999) 134 CCC (3d) 353, 377 (Binnie J.). Quoting from *R v Daviault* [1994] 3 SCR 63, 74. Emphasis in *R v Stone*

155 (1999) 134 CCC (3d) 353, 377 reference was made to *R v Chaulk* [1990] 3 SCR 1303

156 (1999) 134 CCC (3d) 353, 378 Binnie J. adopts the following definition of automatism '...an act which is done without any control by the mind, such as a spasm a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done while suffering concussion or sleepwalking.' (Lord Denning in *Bratty v AG for Northern Ireland* [1963] AC 386, 409). Emphasis added per Binnie J.

157 (1999) 134 CCC (3d) 353, 379

158 [1992] 2 SCR 871, 902 (La Forest J.)

159 (1999) 134 CCC (3d) 353, 390-2

removed by “judicially created policy”’.¹⁶⁰ Binnie J. was impatient of the idea that juries will not be sceptical when hearing evidence of automatism.¹⁶¹ He said of Stone’s case: ‘He was either unconscious at the time of the killing or he was not telling the truth at the time of the trial. This was a question for the jury.’¹⁶²

The case of *Stone* is illustrative of both sides of the judicial debate surrounding involuntariness in cases where automatism is claimed. Brudner describes the decision as follows: ‘[i]n their concern for controlling dangerous persons, the courts applying the common law have produced a law of automatism that massively violates constitutional rights.’¹⁶³ The majority of the judges in the Canadian Supreme Court simply did not trust the jury to make the correct decision regarding a non-mental disorder automatism plea. Therefore the court sought to construct an elaborate legal framework to ensure that the decision was removed from the jury. Issues of culpability were not considered by the majority to be as relevant as issues of policy. Following the decision in *Stone*, it seems that in order to gain an acquittal on the basis of non-mental disorder automatism in Canada the defendant must: firstly provide evidence including expert medical or psychological opinion to satisfy a trial judge that the defence should be put to the jury and secondly satisfy the jury that on the balance of probabilities she acted involuntarily. Therefore the burden of proof is shifted from the prosecution to the defence, furthermore, ‘[t]he trial judge should start from the proposition, that the condition is mental disorder automatism’¹⁶⁴ and should consider any relevant policy restriction before he puts the defence to the jury. The problem here is this moves the conduct of a trial away from two basic ideals of criminal responsibility. The first being that the accused is innocent until proven guilty and the

160 (1999) 134 CCC (3d) 353, 394

161 ‘The jury in this case, for example, had before it the testimony of the Crown psychiatrist that the appellant’s violent response to his wife’s verbal attack was entirely too purposeful and the loss of memory entirely too convenient to be considered “involuntary”. The members of the jury could, I think, have been counted on to exhibit powerful scepticism about such evidence. Anyone who thinks a jury of bus drivers, office workers and other practical people will be less sceptical than members of the bench or professors of law has perhaps spent insufficient time in buses or around office coffee machines.’ (Binnie J.) (1999) 134 CCC (3d) 353, 400

162 (1999) 134 CCC (3d) 353, 401

163 BRUDNER, A. 2000. Insane Automatism. (2000) 45 *McGill LJ* 65-85, p.84

164 Download from Canadian Justice Department website on 12/3/2000.
<http://www.courts.gov.bc.ca/legalCompendium/Chapt12.htm>

second being that the prosecution must prove its case.

It should be noted that Canada has a Charter of Rights and limitations on the rights of a defendant have to be justified under s.1 of the Charter. The majority of the court found no violation of the Charter.¹⁶⁵ Unsurprisingly the minority strongly disagreed. Binnie J. expressed their disagreement with the majority:

Firstly, I do not accept the Crown's argument that a judge-made classification of situations into mental disorder automatism and non-mental disorder automatism can relieve the Crown of the obligation to prove all of the elements of the offence, including voluntariness. As stated, such an interpretation encounters strong objections under s. 7 and s. 11 (d) of the *Charter*, and there has been no attempt in this case to provide a s. 1 justification.

Secondly, imposition of a persuasive burden of proof on the appellant to establish 'involuntariness' on a balance of probabilities, in substitution for the present evidential burden, runs into the same *Charter* problems, and no attempt has been made in the record to justify it.¹⁶⁶

American Case law.

In reaching his decision in *Stone*, Bastarache J. used, inter alia, two American cases to support the argument that the burden of proof should be altered in non mental disorder cases. These cases, *State v Caddell*¹⁶⁷ and *Fulcher v State*,¹⁶⁸ do confirm that unconsciousness is an affirmative defence¹⁶⁹ in the states of North Carolina and Wyoming, though not without strong dissent from two of the judges, one of whom was the Chief Justice of North Carolina.¹⁷⁰ In his

¹⁶⁵ (1999) 134 CCC (3d) 353, 425

¹⁶⁶ (1999) 134 CCC (3d) 353, 401. Emphasis in original

¹⁶⁷ 215 SE 2d 348 (NC 1975)

¹⁶⁸ 633 P 2d 142 (Wyo 1981)

¹⁶⁹ 'An affirmative defence is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because' (Lake J.) in *State v Caddell* (NC 1975) 215 SE 2d 348, 363

¹⁷⁰ *State v Caddell* 215 SE 2d 348 (NC 1975)

partially dissenting judgement, Sharpe C.J. disagreed with the proposition that automatism should be an affirmative defence. In his view the defence of automatism/unconsciousness went to the voluntariness of action. 'Similarly, proof of a voluntary act negates unconsciousness; voluntary action and unconsciousness cannot co-exist.'¹⁷¹

Neither case seeks to narrow the defence of unconsciousness in the manner in which the majority of the Canadian Supreme Court did in *Stone*. In *Fulcher* the following definition is given to automatism:

The defense of unconsciousness perhaps should be more precisely denominated as the defense of automatism. Automatism is the state of a person who, though capable of action, is not conscious of what he is doing. While in an automatistic state an individual performs complex actions without an exercise of will. Because these actions are performed in a state of unconsciousness, they are involuntary. Automatistic behavior may be followed by complete or partial inability to recall the actions performed while unconscious. Thus, a person who acts automatically does so without intent, exercise of free will, or knowledge of the act.¹⁷²

In *Fulcher* it was accepted that the cause of automatism might be an 'abnormal condition of the mind', but the following statement of the court in *State v Caddell* was cited with approval:

The defenses of insanity and unconsciousness are not the same in nature, for unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind. As a consequence, the two defenses are not the same in effect, for a defendant found not guilty by reason of unconsciousness, as distinct from insanity, is not subject to commitment to a hospital for the mentally ill.¹⁷³

This is a long way from the presumption that most automatism is mental disorder automatism by the majority of the Canadian Supreme Court in *Stone*. The two American cases amount to a strong argument in support of the minority judgment in *Stone*.

It is impossible to review the whole of American case law with regard to unconsciousness or

¹⁷¹ 215 SE 2d 348, 367 (NC 1975)

¹⁷² *Fulcher v. State* 633 P 2d 142, 145 (Wyo 1981)

¹⁷³ *State v Caddell* 215 SE 2d 348, 360 (NC 1975) cited in *Fulcher v State* 633 P 2d 142, 145 (Wyo 1981)

automatism within this thesis. A good review of the subject area is contained in American Law Review,¹⁷⁴ and in La Fave and Scott.¹⁷⁵

Automatism has been recognised as a possible defence where the accused was in a semi-conscious state, between waking and sleeping.¹⁷⁶ It has also been recognised where the accused was driving and suffered a loss of consciousness. In the *Government of the Virgin Islands v Smith*,¹⁷⁷ there was sufficient evidence that the defendant who had killed a pedestrian whilst driving his car was in a state of unconsciousness at the time, there were no skid marks on the road where the accident occurred and he had no reason to expect an epileptic seizure. This can be contrasted with the approach adopted in the case of *Smith v The Commonwealth*¹⁷⁸ where the defendant had been suffering from seizures and was therefore prevented from claiming the defence, because he had failed to act as a prudent individual would behave. This reasoning is similar to the reasoning of the Scottish Sheriff's court in *MacLeod v Mathieson*.¹⁷⁹ La Fave and Scott comment¹⁸⁰ that in such cases 'his conduct in driving may amount to criminal negligence'.¹⁸¹ This approach was confirmed in *State v Hinkle*.¹⁸² They also note the individual States' courts have accepted defences in cases where the underlying cause has been 'epilepsy',¹⁸³

174 For a detailed examination of the case law to 1997 see EICHELBERGER, E.A. 27th ALR 4th Annotation and supplement. Rochester, New York: Lawyers Cooperative Publishing

175 LA FAVE, W. R. & SCOTT, A.W. Jr. 1986. *Criminal Law* (2nd edit.). St. Paul, Minnesota: West Publishing Co. See also LA FAVE, W.R. 2000. *Criminal Law* (3rd edit.). St Paul, Minnesota: West Group

176 *Fain v Commonwealth* 78 Ky 183 (1879)

177 278 F 2d 169 (3d Cir 1960), epilepsy, *People v Freeman* Cal App 2d 110, 142 P 2d 435 (1943), epilepsy

178 268 SW 2d 937 (Ky 1954)

179 1993 SCCR 488

180 LA FAVE, W. R. AND SCOTT, A.W, Jr. 1986. p.383

181 *Tift v State* 17 Ga App 663, 88 SE 41 (1916)

182 489 SE 2d 257 (WVa 1996)

183 Footnoted to *People v Higgins* 5 NY 2d 607 (1959), and *State v Welsch* 8 Wash App 719, 508 P 2d 1041 (1973)

somnambulism,¹⁸⁴ hypnotism,¹⁸⁵ a concussion or some other physical trauma,¹⁸⁶ or even an emotional trauma.¹⁸⁷

The American Law Review reveals that the defence has not yet been recognised in all states, and its status varies both as to whether it is an affirmative defence or as to whether it is part of the insanity defence. La Fave and Scott summarise the manner in which the defence is employed by the courts as follows:

The basis of the automatism defense is seldom made clear in the cases. One may, of course, note some similarities between the insanity defense and the automatism defense, although it is clear that the latter is not merely a facet of the former; the automatism defense may be present notwithstanding the defendant's lack of the 'mental disease or defect' which insanity requires. Another explanation is that the automaton defendant is not criminally liable because he lacks the mental state which the crime requires, and this appears to be the rationale most commonly hinted at in the cases. However, it is undoubtedly more correct to say that such a person is not guilty of a crime because he has not engaged in an 'act' (defined as a voluntary bodily movement), and without an act there can be no crime. This rationale, which is employed in the Model Penal Code §2.01 goes well beyond the no-mental-state reasoning, for it would support an automatism defense to a charge of a strict-liability offense. But under either of the latter two theories the defense, if successful, results in outright acquittal.^{188 189}

184 *Fain v Commonwealth* 78 Ky 183 (1879), *Bradley v State* 102 Tex Crim R 41, 277 SW 147 (1926). In *Bradley* somnambulism was recognised as a type of insanity defence

185 Footnoted to *People v Marsh* 170 Cal App 3d 338, P 2d 495 (1959) and *People v Worthington* 105 Cal 166, 38 P 689 (1894). It should be noted that in both cases the court ruled that evidence as to the effect of hypnosis was admissible but on the facts both defendants were convicted. The only English reported case to consider a claim based upon hypnotism is *Gates v McKenna* (1999) 46 BMLR 9. This is a civil case where the idea that hypnotism had caused automatism was rejected on the facts of the case

186 Footnoted to *People v Newton* 8 Cal App 3d 359, 87 Cal Rptr 394 (1970), *Read v People* 119 Colo 506, 205 P 233 (1949), *Carter v State* 376 P 2d 351 (Okla Crim App 1962)

187 Footnoted to *People v Wilson* 66 Cal 2d 749, 427 P 2d 820 (1967), *People v Lisnow* 88 Cal App 3d Supp 21, 151 Cal Rptr 621 (1978)

188 LA FAVE, W.R. & SCOTT, A.W. Jr. 1986. p.384

189 The Model Penal Code 'requiring a voluntary act (or omission) for every offense and defining voluntary acts as excluding a reflex or convulsion; a bodily movement during unconsciousness or sleep; conduct during hypnosis or resulting from hypnotic suggestion; or a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.' LA FAVE, W.R. 2000. p.408

There is therefore no doubt that there is a defence of unconsciousness/automatism in American Law.¹⁹⁰

Given the variety of opinions expressed in the case law what is of greatest interest is novel approaches taken to cases and the attitudes of various judges to the problems posed by the defence, as previously discussed. Interestingly American judgments make reference to English case law.¹⁹¹ For example in *Fulcher* reference was made to *M'Naghten*, *Hill v Baxter*, *Bratty*, *Charlson* and *Kemp*.¹⁹²

Two recent cases are interesting with regard to the boundaries of the automatism defence in the state of Indiana. In *McClain v State*¹⁹³ the defendant was charged with 'battery against police officers, and resisting law enforcement.' The trial judge ruled that expert testimony on sleep disorder and dissociative states could not be heard as *McClain* had 'withdrawn the insanity defence.' The Supreme Court of Indiana had to consider an appeal from the Court of Appeal concerning whether sleep deprivation was relevant to voluntariness. The Court of Appeal had held that *McClain's* defence was only relevant to insanity. The defendant's case was based upon sleep deprivation. He had flown from Japan to Indianapolis and as a result claimed that he had only slept for 'three hours in the forty eight hours prior to his arrest.'¹⁹⁴ *McClain* withdrew the insanity defence he had originally intended to use because it was argued that 'evidence of "automatism" did not need to be presented as an insanity defence.'¹⁹⁵

It was the first time the Indiana Supreme Court had considered automatism, the trial court had felt bound by an earlier appeal court decision¹⁹⁶ and therefore found that automatism was part of

190 LA FAVE, W.R. & SCOTT, A.W. Jr. 1986. p.382

191 See LA FAVE, W.R. 2000. Reviews English case law p.409-11 - almost half of the discussion relating to automatism is a discussion of the English case law.

192 *Fulcher v State* 633 P 2d 142, 165 (Wyo 1981)

193 678 NE 2d 104 (Ind 1997)

194 Both quotations 678 NE 2d 104, 105 (Ind 1997).

195 678 NE 2d 104, 107 (Ind 1997)

196 *Hollander v State* 156 Ind App 329, 296 NE 2d 449 (1973)

the insanity defence. The Supreme Court had to address the question:

Did the trial court err in ... excluding evidence of expert testimony about the capacity of the defendant to form criminal intent on the night in question and expert testimony regarding sleep disorders and/or dissociative states, because the defendant, David M. McClain, withdrew his insanity defense?

The Supreme Court reversed the lower court's decisions and ordered a retrial. The court accepted that within America states were split as to whether the defence of automatism was a species of the insanity defence. However McClain's defence was based on evidence that he had not acted voluntarily.

McClain claims that he was unable to form criminal intent on the night in question due to an automatistic state of mind that precluded voluntary behaviour. Although the jury is obviously not required to accept this explanation, permitting McClain to make the argument is consistent with the statute's general purpose that criminal conduct be an 'act of choice' by a person in a 'conscious state of mind.'¹⁹⁷

In court the effect of the Voluntary Act Statute 1976¹⁹⁸ was said to be that it codified 'the axiom that voluntariness is a "general element of criminal behaviour" and reflected the premise that criminal responsibility "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."' In court the reasoning underlying the section was considered and the views of the commission considering the revision to the Indiana Code are stated to be 'the term voluntary is used in this Code as meaning behaviour that is produced by an act of choice and is capable of being controlled by a human being who is in a conscious state of mind.'¹⁹⁹

The court did not recognise an 'automatism defense per se, only that McClain is entitled to present evidence tending to show whether he acted voluntarily.' The State had to prove that McClain acted voluntarily and McClain had the right to call medical evidence to support his

197 678 NE 2d 104, 107 (Ind 1997)

198 Indiana State legislation codified as Indiana Code § 35-41-2-2 (1993)

199 678 NE 2d 104, 107 (Ind 1997)

claim. If the State did not prove its case ‘the law requires an acquittal.’ The court considered *Fulcher v State* and *State v Caddell* and decided that ‘automatism was not a species of the insanity defense.’ The court concluded that automatism in McClain’s case was ‘manifested in a person of sound mind.’²⁰⁰

The policy consideration of the court was not public safety but, the waste of public resources in holding that an automaton was subject to the court procedures governing insanity.

One important policy underlying the insanity defense is ensuring that mentally-ill criminal defendants receive treatment for their condition. This raises a second and equally important consideration why automatism should not be regarded by the courts as a species of insanity. Although automatism could be the product of a diseased mind in need of treatment and rehabilitation, nothing in the record indicates that McClain presents such a case and McClain does not assert that he does. A ‘successful’ defense resulting in a ‘not responsible by reason of insanity’ verdict would leave the automatistic defendant in custody pending a commitment hearing. ... Consequently, merging the automatism and insanity defenses could result in confinement, at least temporarily, not of the insane but of the sane. This is a significant deprivation of liberty for an automatistic defendant where the outcome of the commitment hearing is a foregone conclusion. Even apart from the defendant’s interest, in absence of grounds for believing an automatistic defendant suffers from a recurring mental disorder, it is reasonable to infer that legislators did not intend to occupy the courts with commitment hearings for defendants whose sanity is not in question.²⁰¹

In *Reed v State*²⁰² the Court of Appeals in Indiana heard an appeal from a defendant who suffered from transient ischemic attack (TSI). These attacks were caused by a series of small strokes. The defendant was accused of theft but claimed the thefts occurred during a TSI attack which caused her to become confused and to walk out of a store without paying for goods. The Court of Appeals applied one of the definitions considered by the Indiana Supreme Court in *McClain* and stated that Reed fell within this definition and was therefore not subject to the insanity provisions of the Indiana Code. The definition was ‘connoting the state of a person

200 678 NE 2d 104, 108 (Ind 1997). All quotations

201 678 NE 2d 104, 109 (Ind 1997)

202 693 NE 2d 988 (Ind 1998)

who, though not capable of action, is not conscious of what he was doing.’²⁰³ The quotation is from Viscount Kilmuir’s opinion in *Bratty*.²⁰⁴ The defence in *Indiana* is broader than the House of Lords’ view of the defence and includes, ‘somnambulism, hypnotic states, fugues, metabolic disorders and epilepsy and other convulsions and reflexes.’²⁰⁵ Whether a defendant should be treated as insane rests upon whether she is of sound mind. No objective test of soundness of mind was proposed by the court.

Normally it is not possible to assess the attitude of the jury to a claim of automatism but in America jurors may speak to the press after the trial. On 25th June 1999 in Arizona Falater was convicted of the murder of his wife. He claimed that the criminal acts were committed when he was sleepwalking. Expert evidence was presented at the trial by both prosecution and defence. The defence argued that Falater had a history of sleepwalking and was suffering from stress at the time of the attack upon his wife.²⁰⁶ The prosecution expert witnesses argued otherwise. The jurors who heard the case ‘did not find his sleepwalking defense absurd at all.’ However his defence failed because although some jurors believed he was sleepwalking they did not believe he was sleepwalking ‘through the entire attack.’²⁰⁷

‘We didn’t think that a sleepwalker could perform the sequence of detailed events the way [previous prosecution witness and Falater’s neighbor] Greg Koons was able to observe them,’ said jury foreperson Mike Riley in a post-verdict press conference. ‘The deciding factor for us was that it seemed improbable that a person could be unconscious during that whole time.’²⁰⁸

203 678 NE 2d 104, 106 (Ind 1997), 693 N.E. 2d 988, 992 (Ind. 1998). Once again this is Lord Denning’s definition of automatism in *Bratty v AG for Northern Ireland* [1963] AC 386, 409

204 [1963] AC 386, 390, (Viscount Kilmuir)

205 678 NE 2d 104, 106 (Ind 1997)

206 Not Under the Influence - Sleepwalking Rejected as Defense in Murder Case
<http://204.202.137.110/sections/us/DailyNews/sleepwalk990625.html> (22/11/99)

207 Jurors in sleepwalking murder trial say they believed the defense to an extent
http://www.courttv.com/trialsfalater/062599_jurors_ctv.html (17/08/99). Both quotations

208 Jurors in sleepwalking murder trial say they believed the defense to an extent
http://www.courttv.com/trialsfalater/062599_jurors_ctv.html (17/08/99)

Thus in the *Falater* case the jury seem to have been sceptical with regard to the evidence of automatism. Obviously it is not possible to assess whether juries in other cases have been similarly sceptical because of lack of information regarding proceedings in the jury room. It is possible to suggest however that juries are not as gullible as Bastarache J. suggested in *R v Stone*. It is also interesting that the jury's decision relied upon the apparent purposefulness of Falater's actions.

An interesting approach to driving and sleep

One of the areas in which the English courts have been unprepared to accept that apparently purposeful action could found a defence of automatism is in the driving cases. In *Attorney General's Reference (No 2 of 1992)*²⁰⁹ Lord Taylor C.J. said 'the defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough.'²¹⁰ The driver in this case was described by the defence expert witness as 'driving without awareness', a condition in which very little 'intrudes into the driver's consciousness when he was in that state'²¹¹ The argument made by the defence was that the defendant's lack of control of the vehicle was caused by an external factor - the lack of stimulus from driving on a motorway.²¹² According to Lord Taylor the driver retained sufficient control over his actions to be responsible for them even though he was only aware of the risk of collision when it was too late to take action to avoid it.

In *Jiminez v The Queen*²¹³ the Australian High Court considered a claim that driving whilst asleep could not be a voluntary act. The offence with which Jiminez was charged was culpable driving. Jiminez seems to have fallen asleep at the wheel of the car he was driving, the car

209 [1993] 4 All ER 683

210 [1993] 4 All ER 683, 689

211 [1993] 4 All ER 683, 686-7

212 This may have been to avoid an insane automatism verdict. In *Attorney General's Reference (No 2 of 1992)* reference is made to sleepwalking as having an internal cause [1993] 4 All ER 683, 669

213 (1992) 173 CLR 572. For a review of the case see McCUTCHEON, J.P. 1997. Involuntary conduct and the Case of the Unconscious 'Driver': Reflections on *Jiminez*. (1997) 21 *Crim LJ* 71-9 and LANHAM, D. 1993. Involuntary Acts and the Actus Reus. (1992) 17 *Crim LJ* 97-101

crashed causing the death of one of the passengers. It seems that Jiminez was awake for a short period before the impact but was unable to ‘regain control’ of the car.²¹⁴ The court said that culpable driving was ‘no different to any other offence and requires the driving, ... to be a conscious and voluntary act.’²¹⁵ The court also said that the offence required ‘a motor vehicle to have been driven in a manner dangerous to the public at the time of the impact which occasioned the death.’²¹⁶ The High Court decided that the judge’s summing up to the jury did not make this clear. Thus it was ‘left open to the jury to convict the applicant in respect of an act for which he was not legally responsible.’²¹⁷ The Crown did not dispute that Jiminez was asleep when the vehicle left the road. Jiminez’s conviction was quashed because a retrial would be inappropriate.²¹⁸

The main argument of the court was that once it was proved that the defendant was asleep his actions ‘were not voluntary and could not amount to driving in a dangerous manner.’²¹⁹ The factors which were relevant to criminal liability were questions relating to prior fault. ‘There was no evidence before the jury that he had consumed any alcohol or drugs.’ There was insufficient evidence that he had not had enough sleep prior to driving. ‘In these circumstances, the inference that the applicant believed that, in all the circumstances, it was safe to drive might have been drawn by the jury from the very fact of his driving.’²²⁰ Other issues that were relevant

214 (1992) 173 CLR 572, 577

215 (1992) 173 CLR 572, 577

216 (1992) 173 CLR 572, 578

217 (1992) 173 CLR 572, 589

218 ‘We have given careful consideration to the question whether a new trial should be ordered. It is now more than three and a half years since the accident occurred. The applicant has already been subjected to the expense, strain and inconvenience of a trial. The case against him was not a compelling one. There was no evidence that the applicant was affected by alcohol or drugs. There was evidence to the effect that he had had adequate sleep before commencing to drive and that he had had no prior warning, or otherwise ought to have known, that he was about to fall asleep. The sentence imposed, upon the applicant’s conviction, was one of periodic detention which, if it had been served, would by now have expired. In all these circumstances, we have reached the conclusion that it would be inappropriate to order a retrial.’
(1992) 173 CLR 572, 585

219 (1992) 173 CLR 572, 584

220 (1992) 173 CLR 572, 583. Both quotations

to prior fault were ‘the period of the driving, the lighting conditions (including whether it was night or day) and the heating or ventilation of the vehicle’ and whether there was any ‘warning of the onset of sleep’²²¹ or whether the car was in a ‘seriously defective condition’.²²²

The Australian High Court took the view that the defence of involuntariness here was akin to the defence of honest and reasonable mistake. ‘Driving in a manner dangerous to the public is at once the offence and, if it is relevant the fault, but it will be a defence to establish an honest and reasonable mistake as to the facts which if true would exculpate the driver.’ Thus driving a defective vehicle when the accused had no reason to believe it was defective might excuse. ‘And the same issue is raised when, in a case like the present where the dangerous manner of the driving is said to consist in the likelihood of going to sleep, a driver claims that he had no warning of the onset of sleep.’²²³ By this means the majority in the Australian court was able to view *Attorney General’s Reference (No 2 of 1992)* as less relevant than *R v Gosney*, where the English Court of Appeal had held that dangerous driving was ‘not an absolute offence.’²²⁴ It is questionable whether the English court took the same wide view of fault as the Australian because Megaw LJ. continues:

‘Fault’ certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver. Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. A fault in that sense, even though it might be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient. The fault need not be the sole cause of the dangerous situation. It is enough if it is, looked at sensibly, a cause. Such a fault will often be sufficiently proved as an inference from the very facts of the situation.²²⁵

221 (1992) 173 CLR 572, 580. Both quotations

222 (1992) 173 CLR 572, 579

223 (1992) 173 CLR 572, 583. Both quotations

224 *R v Gosney* (1971) 55 Cr App R 502, 508

225 *R v Gosney* (1971) 55 Cr App R 502, 508. Emphasis in original

On this narrower view of fault it seems that Jiminez's appeal might not have been successful.

The Australian court seems also to take a more robust approach to somnambulism in that the statement regarding voluntary acts committed whilst asleep is very clear 'his actions while he was asleep were not voluntary and could not amount to driving in a dangerous manner.'²²⁶

Summary

This chapter has examined a number of different approaches adopted to claims of involuntariness in different jurisdictions. In Scotland and New Zealand the approach has been to concentrate on the mental elements of the defence to a greater extent than in the other jurisdictions. This is most marked in the approach adopted by the High Court in New Zealand in *Bannin*. What is problematic about the decision is the difficulty of reconciling notions of involuntariness as fundamental to criminal responsibility with Fisher J.'s third test of capacity according to which 'the threshold will vary from one crime to another.'²²⁷

In some jurisdictions when claims of dissociation have been considered a soundness of mind test has been proposed by the courts. In Australia and Canada the test used to distinguish borderline cases of insanity from automatism is an objective test. The introduction of an objective test in one area of automatism is problematic as was pointed out by Dickson J., who also highlighted another problem created by the objective test 'I cannot accept the notion that an extraordinary external event, i.e. an intense emotional shock, can cause a state of dissociation or automatism, if and only if all normal persons subjected to that sort of shock would react in that way.'²²⁸

The adoption of the stance in Canada that courts should assume that when automatism is raised the defence is mental disorder automatism is worrying. The difficulties with this decision are linked to the weight being given to social policy issues and the distortion which Sir Owen Dixon detected in *Kemp*. The problem is well expressed by Fairall who was writing about the

226 (1992) 173 CLR 572, 584

227 [1991] 2 NZLR 237, 251

228 *R v Rabey* [1980] 2 SCR 513, 548

Australian High Court's decision in *Falconer*:

Some of the difficulties encountered in this field undoubtedly arise because of our incomplete knowledge about the psycho-dynamics of human behaviour. Other difficulties arise because of a set of rules which produces conflict and possible injustice. Little can be done about the former, but something can be done about the latter. The divergent rules governing onus and burden of proof create enormous practical difficulties for the judge and the jury. They impact upon the manner in which the jury is required to deliberate on the fundamental question of guilt. The artificiality of the fact-finding process resulting from the presumptions of mental capacity and mental soundness may work substantial injustice. When the jury is told that it must ignore evidence which may suggest a complete absence of fault unless such evidence is accepted as more likely than not (that is, on the balance of probabilities), the potential for injustice is obvious. The problem is compounded by the vagueness of the criteria which define irresponsibility under the various insanity tests.²²⁹

Judges have to weigh against this the policy reasons for ensuring that the courts retain control over a defendant who has committed a dangerous act which may recur. However, in *Parks*, the majority of the Canadian Supreme Court were of the view that: '[o]ur system of justice is predicated on the notion that only those who act voluntarily should be punished under the criminal law.'²³⁰ This can only be achieved in terms of claims of involuntariness if the courts have a clear idea undistorted by policy considerations of what it means for 'action' to be involuntary, and are prepared to give effect to their statements of support for the fundamental nature of the voluntary act requirement. Despite the statement in *Parks*, when it came to the subsequent Canadian Supreme Court decision in *Stone* it was the minority, rather than the majority, who strongly supported the assertion of the requirement of voluntariness by Cory J. in *Daviault*: '[t]he term *mens rea*, properly understood, does not encompass all of the mental elements of a crime. *The actus reus has its own mental element; the act must be the voluntary act of the accused for the actus reus to exist*'.²³¹

Lord Hope in *Ross v HM Advocate* did not see policy issues as determinative where there were sufficient safeguards in the framing of the defence to prevent it being abused. In Lord Hope's

229 FAIRALL, P.A. 1993. p.95-6

230 *R v Parks* [1992] 2 SCR 871, 874

231 *R v Daviault* [1994] 3 SCR 63, 74

view what was required to support the defence was ‘total alienation of reason amounting to a complete absence of self control’ and this must be due to ‘some external factor which was outwith the accused’s control and which he was not bound to foresee.’²³² Policy consideration have led to different concerns being expressed in Scotland with regard to driving offences where the view is taken that what is relevant is the defendant’s knowledge of the risk of an automatic episode. This approach has also been adopted in various states in America.

Policy considerations have led to the adoption of various tests in borderline cases of automatism where the behaviour of the defendant is dangerous. In England and Wales in *Quick* the internal/external distinction was canvassed as an attempt to escape from the confines of the decision in *Bratty*. This test was seen by Toohey J. in *Falconer* as not paying sufficient ‘regard to the subtleties surrounding the notion of mental disease.’²³³

Policy considerations do not all lie in one direction as Gresson P. pointed out in *Cottle*:

Two major considerations will have to be balanced: (1) fairness to the accused, who should not have imposed upon him a defence which he does not himself advance ... (2) the public interest which requires that a person prosecuted by the Crown on behalf of the State should not be permitted to seek an unqualified acquittal through absence of intent if his mental condition really amounts to insanity.²³⁴

Courts in Australia, England and America have argued that there are additional policy considerations in the inappropriateness of subjecting those who do not suffer from a mental disorder to treatment. In *McClain* the wasteful use of state resources, and the ‘significant deprivation of liberty’²³⁵ for the accused were included within the equation.

Though the ‘psycho-dynamics of human behaviour’ are not fully discoverable it might be argued that they could usefully be further discussed in achieving a better knowledge of how

232 1991 SLT 564, 569. Both quotations

233 (1990) 171 CLR 31, 76

234 *R v Cottle* [1958] NZLR 999, 1013

235 678 NE 2d 104, 109 (Ind 1997)

involuntariness relates to the voluntary act requirement.²³⁶ Additionally the framework of criminal liability needs to be further discussed, to assess whether the draconian changes in the burden of proof and presumptions with regard to automatism advanced in *R v Stone* could ever be justified. In the next chapter it is proposed to examine, philosophical and neuroscientific constructions of 'action' to see whether they can offer an improved understanding of the 'psycho-dynamics of human behaviour.'

A final point needs to be made, some of the American case law makes the point that automatism or lack of consciousness does not necessarily lead to a defence based on insanity. It would seem preferable for the courts to acknowledge that this is so by abandoning the terms 'non-insane automatism' or 'non-mental disorder automatism'. Where a defendant is not to be labelled an insane automaton an acquittal on the basis of automatism would seem a preferable and more fairly expressed verdict.

236 For a discussion of the psycho-dynamics of human behaviour in relation to automatism and insanity see SCHOPP, R.F., 1991. *Automatism, Insanity and the Psychology of Criminal Responsibility*. Cambridge University Press

Chapter 4

Criminal case law definitions of ‘involuntariness’ and ‘act’ tend to see both as a part of the voluntary act requirement. Involuntariness itself is rarely defined, where it is a number of definitions emerge. In *DPP for Northern Ireland v Lynch*, Lord Simon saw criminal responsibility as based upon the ‘free human will’ and the ‘power of choice’ which it provided. He continued ‘[v]olition I take to be synonymous with “will” (i.e. the power of directing conscious choice); so an act is a voluntary physical movement, and an involuntary physical movement is not an act.’ This approach to criminal responsibility means that involuntariness becomes a way of describing unwilled physical movement as something which is not an act and does not therefore attract criminal liability. Lord Simon states that the criminal law’s description of action, is a ‘term of art used by the law to denote a person’s physical movement actuated by his will.’¹ In this sense ‘involuntary action’ cannot exist because once a physical movement is described as involuntary it ceases to be an ‘act’, or at the least an ‘act’ for which criminal liability may be imposed.² It is noticeable that this definition is less reductionist than the traditional jurisprudential definition of involuntary action.

As was seen in the last chapter, in defining automatism courts have used the terms ‘unconscious’ ‘not conscious’ and ‘involuntary’. In *Bratty v Attorney General for Northern Ireland*, Lord Denning said:

No act is punishable if it is done involuntarily: and an involuntary act in this context - some people nowadays prefer to speak of it as ‘automatism’ - means an act which is done by the muscles without any control by the mind such as a spasm, a reflex action or convulsion; or an act done by one who is not conscious of what he is doing such as an act done while suffering from concussion or while sleepwalking.³

1 [1975] AC 653, 689. Both quotations

2 For a discussion of the case law surrounding action see MACKAY, R.D. 1995. p.11-12

3 [1963] AC 386, 409. Lord Denning’s definition of automatism in *Bratty* has been widely referred to in the case law researched for this thesis. For example *R v Burr* [1969] NZLR 736; *State v Caddell* 215 SE 2d 348 (NC 1975); *Rabey v The Queen* [1980] 2 SCR 513; *Fulcher v State* 633 P 2d 142 (Wyo 1981); *Queen v Falconer* (1990) 171 CLR 30; *Ross v HM Advocate* 1991 SLT 564; *R v Parks* [1992] 2 SCR 871; *McClain v State* 678 NE 2d 104 (Ind 1997); *R v Stone* (1999) 134 CCC (3d) 353

Some neuroscientific and medical explanations of movement.

How does this definition of action coincide with a neurological definition of movement? In her book, *The Human Brain*, Greenfield gives a very straightforward account of movement and how it is achieved.

How is movement of any sort actually achieved? The contraction of the appropriate muscle occurs following a signal sent down from the brain, along the spinal cord. Nerves controlling all the different muscles leave the spinal cord in an ordered fashion, according to the location of the muscle in the body. People with injuries to their spine are unable to move to varying extents according to the level at which the spinal cord is damaged.

Sometimes the spinal cord can function more or less autonomously, without descending instructions or control from the brain. Such movements are reflexes. A reflex can be defined as a fixed response to a particular trigger - the most obvious example is the knee jerk. The knee jerk reflex is triggered when the knee is tapped and in response the lower leg shoots out. Neuroscientists refer to this familiar sequence of events as the 'stretch reflex' because the tap at the critical point on the knee in effect compresses a tendon by which the muscle in the lower leg is suspended, thereby exerting extra pressure on the muscle and stretching it. In order to compensate for this lengthening, the muscle contracts, so that the leg shoots forward.⁴

This would seem to support Lord Denning's assertion that movements done by the muscles without any control by the mind are involuntary.⁵ It would also seem that on Lord Simon's definition reflexes are not acts. However, reflexes which are stimulated in response to a tap on the knee may be distinguished from spasms or convulsions, in that the knee reflex is induced by the tap, spasms or convulsions are likely to have more complex causes. Greenfield continues:

Our normal repertoire of movement is not one of fixed responses to rather artificial triggers like the neurologist's delicate hammer. We do not wait for someone to tap our knee so that we might jerk our leg. Many of the movements we make - such as walking, swimming, and running - involve a more complex coordination of muscle

4 GREENFIELD, S. 1997. *The Human Brain - A Guided Tour*. London: Weidenfeld and Nicolson. p.35

5 It is notable that the use of the word 'reflex' refers only to artificially triggered movement in this example, this definition is narrower than the reflex act considered in the Australian case of *Ryan v R* (1967) 121 CLR 205, where a defence based around the alleged reflex of inadvertently pulling a trigger whilst actually doing something else was considered and rejected. On the neuroscientific definition such movement would not fit the description 'reflex'. See further discussion of this point in chapter 5

groups. But even these movements are in a sense, semi automatic. These kind of rhythmic, subconscious movements are caused by signals coming down from the brain stem.⁶

On this explanation much movement will take place as a result of subconscious brain activity. Two parts of the brain which are important in subconscious movement are the cerebellum and the basal ganglia. The cerebellum, responds to feedback from the body's sense mechanisms. According to Greenfield, the cerebellum is 'of vital importance since the sensory motor coordination it generates underpins skilled movements that are also the type of movement not requiring conscious thought. These movements improve with practice and become almost subconscious. For this reason the cerebellum has been dubbed the "autopilot" of the brain.'⁷ Greenfield discusses other subconscious movements, 'ballistic movements' which are controlled by the basal ganglia. Damage to different parts of this area of the brain results in 'wild involuntary movements' typified by those suffering from Huntington's chorea or 'muscle rigidity and tremor' as in Parkinson's disease.⁸ Neuroscience, as explained by Greenfield, suggests no centre for the control of movement in the brain. Rather it seems that different types of movements are controlled by different areas of the brain.

A more precise neuroscientific explanation of conscious motor control of movement becomes difficult to construct, because it is not possible to locate a specific area within the brain which is responsible for the control of all bodily movements. Greenfield speculates that at the level of the subconscious, movement is controlled by another region of the brain, the cortex. This region would control 'movement which does not require conscious thought'. The example she gives of this type of movement is 'pressing the brake when the traffic lights are red seems to be an automatic movement, which is in fact associated with the cerebellum.' Her other example is of standing up, a movement requiring no 'immediate sensory trigger', controlled by the basal ganglia.⁹ Her explanation of movement allows for conscious motor control of movement, but only of some movements. She says that '[t]he generation of movement is the net result of

6 GREENFIELD, S. 1997. p.35

7 GREENFIELD, S. 1997. p.39

8 GREENFIELD, S. 1997. p.40

9 GREENFIELD, S. 1997. p.41-2. All quotations

many brain regions acting together as individual instruments do in a symphony. The type of movements being made, and whether it requires conscious control, determines which brain regions are involved.’¹⁰

Thus on the Greenfield explanation of movement only some movements are consciously initiated. The question arises, applying Lord Denning’s definition, whether only consciously initiated movements are voluntary? Lord Denning specifically cites an action done by one who is ‘not conscious of what he is doing’ as an involuntary act and gives as an example ‘an act done while suffering from concussion or while sleepwalking.’ Two problems arise here. The first is that on the Greenfield definition of movement more actions than Lord Denning would envisage could be included as being done by someone who is not conscious, at least initially, of what she is doing. It is unlikely that the courts would envisage either standing up or applying the brake at traffic lights as examples of unconscious action. Indeed in *Hill v Baxter* it was said that ‘once it is proved that the accused was in the driving seat of a moving car there, is, prima facie, an obvious and irresistible inference that he was driving it.’¹¹

The second problem arises from the first, if the neuroscientific construction of movement is accurate physical movement will always have its roots in the unconscious. However, this is only a problem, legally, if an explanation of voluntary action requires that actions should be consciously initiated. It is however a problem for the traditional law doctrine which sees all voluntary action as being initiated by volition. An alternative approach, to the attribution of responsibility and agency is to argue that it will be sufficient that movement may be inhibited before the process of ‘acting’ is completed. It seems likely that the criminal law will wish to impose responsibility on those who continue to ‘act’ after they have become aware that they are ‘acting’.

What should be relevant, on Lord Denning’s definition, is whether a defendant could be said to

10 GREENFIELD, S. 1997. p.42. For further discussion of medical, philosophical, and neuroscientific explanations of movement see CARTER, R. 1998. *Mapping the Mind*. London: Weidenfeld & Nicolson; GREENFIELD, S. (Ed.). 1996. *The Human Mind Explained - the Control of the Living Machine*. London: Cassell; COHEN, D. 1997. *The Secret Language of the Mind*. London: Duncan Baird

11 [1957] 2 WLR 76, 83

be 'conscious' of what they were doing. Neuroscientific evidence suggests that this consciousness occurs at a point later than the initiation of action. What Lord Denning appears to be talking about is conscious awareness of 'acting' rather than whether the mental mechanisms leading to 'acting' are conscious mental processes. This is a subtly different use of the word 'consciousness' from that utilised by Greenfield when describing whether movement is accompanied by consciousness.¹²

In neuroscience and the philosophy of the mind there is agreement that the basic 'building blocks' of consciousness are neurons.¹³ Neurons communicate with each other by means of synapses which use chemicals to stimulate or depress reactions in other neurons. Thus far the explanation is uncontentious. It becomes philosophically contentious when an attempt is made to solve the 'binding problem' that is how neuronal activity translates itself into a unified conscious experience.¹⁴ Here the philosophy of the mind becomes involved in a debate as to the nature of conscious experience.¹⁵ But there are still some basic areas of agreement, namely that conscious experience is based on neuronal activity and some actions do not require full conscious awareness. Thus given the scientific account of action the legal explanation of action is unlikely because it assumes that most action is consciously initiated.

12 For a discussion of different types of consciousness, and a sustained critique of what focus of attention accounts leave out from consideration, see ARVIDSON, S. 2000. Transformations in Consciousness, Continuity the Self and Marginal Consciousness. *Journal of Consciousness Studies*, 2000, vol. 7, no. 3, 3-26. For a discussion of the confusion which may arise from conflating different types of consciousness see BLOCK, N. 1995. On a Confusion About a Function of Consciousness. *Behavioural and Brain Sciences*, 1995, vol. 18, 227-87

13 For a full discussion of how consciousness might be constructed see SEARLE, J. 1997; DENNETT, D. 1991; CHURCHLAND, P. 1995; GREENFIELD, S. 1995. *Journey to the Centres of the Mind*. New York: Freeman; CHALMERS, D. 1996; VELMANS, M. (Ed.). 1996. *The Science of Consciousness*. London: Routledge; DAMASCIO, A. 2000. *The Feeling of What Happens*. London: Heinemann. For a discussion of whether scientific evaluations of consciousness are possible see GOLDMAN, A.I. 2000. Can Science Know When You're Conscious? *Journal of Consciousness Studies*, 2000, vol. 7, no. 5, 3-22

14 For a discussion of this see SEARLE, J. 1997. Chapters 2 & 3

15 For example Dennett argues that conscious experience is a function of the brain. He believes that conscious experience is discontinuous, but he still believes that behaviour falls into two types: the first 'controlled by conscious thought' and the second by 'blind mechanical processes'. According to Dennett, therefore, despite human experience being one of continuous consciousness this is an illusion, and in this sense our sense of self is also an illusion, there being no centre of consciousness within the brain. DENNETT, D. 1991. p.329. This approach could be contrasted with the approach taken either by CHALMERS, D. 1996. or DAMASCIO, A. 2000

This traditional legal view of what an action might be is explained by Hart:

The theory is simply this: a human action is strictly speaking merely a muscular contraction. The usual terminology of ordinary speech - the verbs of action like 'shooting', 'killing', 'hitting', - are inaccurate and misleading, because they misrepresent as single actions what in fact are combinations of muscular movements and later consequences. We should, therefore, confine the word 'act', if we are to think and speak scientifically and clearly, to the mere muscular contraction. This is the first element of the theory. The second that an 'act' is not just a muscular contraction but one which has a special psychological cause. It is caused by a pre-existing desire, which Austin called a 'volition' or 'act of will', for the muscular contraction. Here is the dividing line between mere involuntary movements, like tumbling downstairs, and voluntary actions, like walking downstairs. In the one case the muscular contractions are desired, and caused by the desire for them, and in the other they are not. This is the minimum, indispensable connexion between mind and body if there is to be an 'act' and responsibility. Of course in a full blown action (according to ordinary speech) like 'killing' there is, if it is done intentionally, besides the desire or 'volition' for the muscular movement, knowledge of circumstances and foresight or desire of consequences, and in criminal cases these elements may also be necessary for responsibility as part of *mens rea*. But these are to be distinguished from the 'volition' or 'act of will' which is solely a desire for the muscular movements.¹⁶

The problem with this explanation of involuntary movement, and indeed with Austin's explanation of human action from which it is taken,¹⁷ is that thinking 'scientifically and clearly' they do not make sense. Twenty first century scientific constructions of movement suggests that on the whole information processing regarding individual movement takes place at a subconscious level. This is not fatal to the law's conception of voluntariness provided that individuals may be shown to have the ability to act other than they did. But on a modern scientific description of movement it is questionable whether a volition would have the role ascribed to it of 'a special psychological cause.' This is because volition is isolated in the traditional description to a desire for a muscular contraction.

Hart disagrees with the traditional explanation of action. In his view the role of voluntariness in the criminal law 'is the minimum indispensable connection between mind and body if there is

16 HART, H.L.A. 1968. p.97-8

17 See Introduction p.22-5 & 28-30 for a discussion of Austin's explanation

to be an 'act' and responsibility.'¹⁸ He viewed the traditional legal explanation of action as deficient on two counts. Firstly he felt it unnatural to speak of omissions, as being criminal acts involving 'muscular contractions or movements'.¹⁹ Secondly in Hart's opinion the division of action into three constituents, 'a desire for muscle contractions, followed by the contractions, followed by foreseen consequences' was faulty. In his view it was 'quite at variance with the ordinary man's experience and the way in which his own actions appear to him.'²⁰

One modern scientific version of the initiation of action has the advantage of answering both of Hart's criticisms of the voluntary act requirement. There is scientific evidence which suggests that the element of control of action comes at a later stage than envisaged by the willed bodily movement model this will be examined later in this chapter in the discussion of the work of Libet. On the Libet thesis control over action is more in the nature of a veto than a volition. It may be that Libet's account of how action is controlled is a more sustainable account of action than the traditional legal account. It provides a credible explanation of what it means to omit to act as the decision not to act is taken once the possibility of acting has entered the potential actor's conscious awareness.

How much reliance should be placed upon the ability of neuroscientists and biologists to interpret behaviour through brain scanning? Churchland speculates that neuroscientific imaging techniques may in due course assist courts in evaluating the causes of criminal behaviour.²¹ He conjectures that such techniques may permit the courts to 'distinguish between the truly problematic people and others - those who have merely stumbled into an encounter with the

18 Several writers have suggested that one of the problems with action definitions within the criminal law is that they try to define action in a particular way to assist with attributions of criminal responsibility. 'Although many answers may be given it is noteworthy that the act requirement is frequently invoked in attempts to differentiate the conditions of moral and criminal responsibility.' HUSAK, D. 1998. Does Criminal Liability Require an Act? in DUFF, R.A. (Ed.). 1998. *Philosophy and the Criminal Law*. Cambridge University Press. p.62. See also FITZGERALD, P.J. 1961. p.1

19 HART, H. L. A. 1968. p.100 Hart is not alone in this view see FLETCHER, G.P. 1994. On the Moral Irrelevance of Bodily Movements. (1994) 142 *UPLR* 1443-1561

20 HART, H. L. A. 1968. p.101. Both quotations

21 CHURCHLAND, P. 1995. Chapter 10

law'.²² However, he does not suggest such techniques are available at present. 'None of this is imminent. Decades of exploration, both neurological and legal, lie before us still.'²³ He does however suggest that the legal profession needs to update its knowledge of neuroscience and to 'get a reliable fix on these matters if it is to make useful decisions based upon them.'²⁴

It may indeed be decades before such focussed brain scanning techniques are available and some might argue that, in the meantime, there is no need to reconsider the willed bodily movement legal model or the other descriptions of involuntariness utilised by the courts. However, if the law adheres to outdated scientific explanations it will become completely out of step with medical and scientific conceptions of how movement occurs. This has led some commentators to view the stance adopted by medicine and the law as rooted in different philosophies.

On the more general point as to whether medicine or indeed any other factual evidence could invalidate the legal reasoning, it is contended not only that it did not in this case,²⁵ but that such evidence never could. The Law starts from some basic assumptions which are accepted *a priori*, and no amount of science or medicine could invalidate those assumptions or anything logically constructed upon them. It is the writers' belief that in fact medicine, particularly where it is scientific, starts from a basically different philosophical position, which is in fact contradictory to the law's philosophical position. The Law starts out with the assumption that every individual has 'free will', and is therefore responsible for his actions (the only exception is where there is something wrong with his 'mind' - note particularly not 'brain' but 'mind' - which prevents him from exercising that free will). An individual is to be punished for the greater good of society if he exercises that free will in a forbidden manner. The main field of enquiry and analysis is to categorize those situations where blame is to be attached, i.e. wrongful exercise of free will has taken place.²⁶

On this view the criminal law is committed to a distinction between mind and brain which is not recognised by many scientists. The additional point inherent in the discussion is the role of

22 CHURCHLAND, P. 1995. p.311-12

23 CHURCHLAND, P. 1995. p.314

24 CHURCHLAND, P. 1995. p.311

25 *R v Hardie* [1984] 3 All ER 848

26 WELLER, M. & SOMERS, W. A. 1991. Differences in the Medical and Legal viewpoint illustrated by *R v Hardie*. (1991) 31(2) *Med Sci Law* 152-6, p.156. Emphasis in original. See discussion of free will and the distinction between medical and scientific explanations of behaviour in chapter 5

determinism. The 'free will versus determinism' debate is one that Blackburn sees as 'commonly identified as a source of tension between law and psychology'.²⁷

How the law defines an involuntary action?

Some commentators see legal descriptions of action as having their roots in Aristotle's descriptions of human behaviour.²⁸ Indeed, Aristotle does discuss what makes action involuntary. Aristotle wrote in *Nicomachean Ethics* at some length about involuntary and voluntary action. 'Virtue, then, is about feelings and actions. These receive praise or blame when they are voluntary but pardon when they are involuntary.'²⁹ For Aristotle involuntary action was that which 'is forced or is caused by ignorance.'³⁰ Though 'action done in ignorance but not caused by ignorance is not necessarily involuntary', an example of this type of action is the action of a drunken man.³¹ Forced action is described by Aristotle 'as where wind or human beings who control him were to carry him off'.³² Thus this type of action lacks authorship, forced action is brought about in this definition either by the power of the elements or by human beings who have physical control over another's actions.

Aristotle distinguishes involuntary action from that action which results from duress. What distinguishes involuntary action from action under duress in his explanation is whether it is 'choiceworthy'.³³ In other words even under duress, 'a mixture of voluntary and involuntary' there is an element of choice which makes actions voluntary. 'Now in fact he does it willingly; for in these sorts of actions he has within him the origin of the movement of the limbs that are the instruments [of the action] and when the action is in him, it is also up to him to do them or

27 BLACKBURN, R. 1995. p.25

28 For a discussion of this see ZAILBERT, L.A. 1998. *Intentionality, Voluntariness, and Culpability: A Historical-Philosophical Analysis*. (1998) 1 *Buffalo Criminal Law Review* 459-99

29 Book iii, 3.11. trans. IRWIN, T. 1985 Indianapolis: Hackett. p.53, There is a debate as to whether Aristotle employed modern notions of moral responsibility - see FISCHER, J.M. & RAVIZZA, M. 1998. *Responsibility and Control*. Cambridge University Press. p.12

30 ARISTOTLE. Book iii, 3.18, p.58

31 ARISTOTLE. Book iii, 3.16, p.56

32 ARISTOTLE. Book iii, 3.12, p.53

33 ARISTOTLE. Book iii, 3.13, p.54

not to do them.’³⁴ This is substantially the distinction the criminal law makes in distinguishing between cases of duress and involuntariness.

Similarly, Aristotle distinguishes involuntary action from voluntary action by the knowledge of certain ‘particulars’ and the ability to make choices. Knowledge of all the ‘particulars’ means that action is voluntary. The ‘particulars’ are ‘(1) who is doing it; (2) what is he doing; (3) about what or to what is he doing it; (4) sometimes also what is he doing it with, e.g. the instrument; (5) for what result e.g. safety; (6) in what way e.g. gently or hard.’³⁵ Aristotle argued that ignorance of some of these particulars made action involuntary especially when he was ignorant of the most important of them; these seem to be ‘(2) what he is doing,’ and ‘(5) the result for which he does it.’³⁶ The paradigm case of involuntary action for Aristotle therefore appears to be when someone is unaware of what she is doing or why she is doing it.

Another distinguishing feature of action for Aristotle is the ability to take decisions. Some voluntary actions might occur without deliberation, that is ‘spur of the moment’.³⁷ Voluntary actions, which are not spur of the moment could however be distinguished: ‘not everything voluntary is decided what is decided is the result of prior deliberation. For decision involves reason and thought’.³⁸ Thus, Aristotle develops a concept of virtue in relation to action which is split into two parts that which is ‘spur of the moment’ and that which is the product of deliberation, involving reason and thought. According to Aristotle it is for these voluntary actions that an individual should receive praise or blame. This splitting of action into two types is useful because it suggests that action which is habitual or spur of the moment should not be viewed as involuntary.

Smith, uses the following quotation from Hart to exemplify why lack of voluntariness should excuse a defendant from criminal liability:

34 ARISTOTLE. Book iii, 3.13, p.54

35 ARISTOTLE. Book iii, 3.17, p.57

36 ARISTOTLE. Book iii, 3.17, p.57

37 ARISTOTLE. Book iii, 3.2, p.59

38 ARISTOTLE. Book iii, 3.22, p.61

What is missing in these cases appears to most people as a vital link between mind and body; and both the ordinary man and the lawyer might well insist on this by saying that in these cases there is not 'really' a human action at all and certainly nothing for which anyone should be made criminally responsible however 'strict' legal responsibility might be.³⁹

Aristotle's definition may refine distinctions between voluntariness and involuntariness but it does not address the problem that White identifies as to what is the cause of movement. Traditionally the link between mind and body has been said by lawyers to be based on the voluntary act, expressed in terms of willed bodily movement. White writes:

There is a difficulty in characterizing the relation between the volition and the body movement which follows it, for it seems to be at the same time both logical and causal. It is logical in that the volition which is alleged, to cause for example, a movement of the index finger is necessarily the volition to do exactly that and it is causal in that it is the cause of the movement. But the cause of something ought to be logically independent of it.⁴⁰

According to Shapira his search for causation using the model of voluntary action being tied to a volition which causes bodily movement is fatally flawed.

The core of the WBM [willed bodily movement] approach is the belief that action is a 'real' event, namely, a bodily movement caused or induced by another 'real' event named 'volition.' In order for this definition not to collapse into the reduction of actions to bare volitions on the one hand, or into the inclusion of complex actions like 'waging a war' on the other hand, its supporters have typically endeavored to identify one particular link in the supposed causal chain leading from volition to remote consequences as a 'basic act.' The distinction between these and other links in the same chain is alleged to have ontological significance. The flaws in this scheme concern each and every one of its components: volitions, bodily movements and basic actions.⁴¹

A further problem exists for the traditional approach to voluntary action in that reductionist explanations of action arguably cannot assist in defining what it means to act in the sense of attributing agency.

39 HART, H.L.A. quoted in SMITH, J.C. 1999. p.38

40 WHITE, A.R. 1985. *Grounds of Liability*. Oxford: Clarendon. p.31

41 SHAPIRA, R. 1998. Structural Flaws of The "Willed Bodily Movement" Theory of Action. (1998) 1 *Buffalo Criminal Law Review* 349-403, p.353

The difficulties for the criminal law in defining action so that it allows for the evaluation of agency

Fletcher suggests that the problem of defining agency through the action requirement lies in the adoption of a 'mechanistic and abstract' test. Fletcher describes the traditional legal definition of action as, '[t]he will is the mechanical cause and the action is the effect. The will is the lever that moves the body into action.'⁴² He suggests that the traditional jurisprudential legal test is mechanistic and cannot in reality define human action. There are philosophical explanations of why this is the case.

Like Fletcher, Nagel considers the subjective viewpoint to be central to any construction of human behaviour. He notes that the only unusual thing about human bodies is their 'chemical and physiological structure.'⁴³ This gives human beings a 'mind, a point of view, a wide range of subjective experiences and mental capacities - none of which can be accommodated by the physical conception of objective reality'. He then considers reductionist explanations of the mind and concludes that they leave something out. What is left out according to Nagel is the 'bearer of mental properties, the subject of mental states, processes and events.'⁴⁴ If it is accepted that in some way the concept of agency links responsibility with action⁴⁵ then presumably Nagel's 'bearer of mental properties, the subject of mental states, processes and events' will be relevant to assessments of agency. In Nagel's opinion any method of evaluating agency will necessarily include the assessment of subjective experience.

Hornsby highlights the distinction between two types of agency

SOME philosophical problems about agency can be put in terms of *two points of view*. From the *personal* point of view, an action is a person's doing something for a reason, and her doing it is found intelligible when we know the reason that led her to it. From the *impersonal* point of view, an action would be a link in a causal chain that could be

42 FLETCHER, G.P. 1998. *Basic Concepts of Criminal Law*. Oxford University Press. p.51

43 NAGEL, T. 1986. *The View from Nowhere*. Oxford University Press. p.28

44 NAGEL, T. 1986. p.29

45 Precisely how this link might be formed will be discussed in the next chapter

viewed without paying any attention to people, the links being understood by reference to the world's causal workings. We might take it for granted that there are truths available to be discovered from each of these points of view. The problems about agency surface when we start to wonder whether the impersonal point of view does not threaten the personal one.⁴⁶

Hornsby is highlighting a major difficulty for the criminal law. In determining voluntary action or involuntariness the law utilises a reductionist test of willed bodily movement. Does this conception of action, impose an objective point of view which threatens the very meaning of agency itself? Hornsby's continued evaluation of agency clarifies this point:

We might think that a full understanding of everything that happens when there is an action could be had without anyone's knowing who did what thing for what reasons. But then, if the whole truth about an action and its causal past and future can be given in viewing it as a manifestation of the world's causal workings, the impersonal point of view can seem to displace the personal one. Of course the personal point of view might still be adopted, even if it seemed redundant from another point of view. But two lines of thought may be used to make it seem redundant *tout court*. First, there is the thought, which Thomas Nagel has made especially vivid, that it is essential to our conceiving of our ourselves as agents that we take our actions to be completely accounted for in the terms that we use as agents; the possibility of treating actions from the impersonal point of view would then subvert our ordinary conception of ourselves.⁴⁷

Hornsby concludes that 'actions are not in fact accessible from the impersonal point of view.'⁴⁸ The willed bodily movement test of voluntary action seems close to an attempt to evaluate action impersonally. Is this possible? May agency be evaluated from an objective viewpoint? The answer to this question for the purposes of this thesis will depend entirely on the type of agency required by the criminal law.

In *The View from Nowhere*, Nagel examines the quality of subjective experience and evaluates the limits of objectivity:

46 HORNSBY, J. 1993a. Agency and Causal Explanation, in HEIL, J. & MELE, A. (Eds.). *Mental Causation*. Oxford University Press. p.161. Emphasis in original

47 HORNSBY, J. 1993a. p.161. Emphasis in the original. Hornsby also sees a further philosophical problem posed by the two approaches to agency regarding the need if the objective point of view is to succeed for the subsumption of the subjective view within the objective view. Something she doubts is metaphysically possible

48 HORNSBY, J. 1993a. p.162

The limit of objectivity with which I shall be most concerned is one that follows directly from the process of gradual detachment by which objectivity is achieved. An objective standpoint is created by leaving a more subjective, individual, or even just human perspective behind; but there are things about the world and life and ourselves that cannot be adequately understood from a maximally objective standpoint, however much it may extend our understanding beyond the point from which we started. A great deal is essentially connected to a particular point of view, or type of point of view, and the attempt to give a complete account of the world in objective terms detached from these perspectives inevitably leads to false reductions or to outright denial that certain patently real phenomena exist at all.

This form of objective blindness is most conspicuous in the philosophy of mind, where one or another external theory of the mental, from physicalism to functionalism, is widely held. What motivates these views is the assumption that what there really is must be understandable in a certain way - that reality is in a narrow sense objective reality. For many philosophers the exemplary case of reality is the world described by physics, the science in which we have achieved our greatest detachment from a specifically human perspective on the world. But for precisely that reason physics is bound to leave undescribed the irreducibly subjective character of conscious mental processes, whatever may be their intimate relation to the physical operation of the brain. The subjectivity of consciousness is an irreducible feature of reality - without which we couldn't do physics or anything else - and it must occupy as fundamental a place in any credible world view as matter, energy, space, time, and numbers.⁴⁹

If Nagel is right then the criminal law faces real problems in constructing a meaningful definition of involuntary action. Hornsby suggests that the problem lies in locating the agent within the 'causal scene'. In determining agency Hornsby suggests that 'responsibility consists in the action's being ours, and not in its having been caused, or done, by us.'⁵⁰ She also suggests that a value neutral definition of action in relation to agency may be impossible. 'Those who seek and give "action explanations" do not regard the matter impersonally or externally, any more than the agent herself does when she deliberates about what to do.' From this she concludes that there is a 'barrier between the external and internal explanatory schemes', and that where the 'ideal of rationality' is used in explanation of an event it is 'delivered from the contents of her [the agent's] thoughts and wants.'⁵¹

One of the problems with impersonal conceptions of action for the purposes of defining agency

49 NAGEL, T. 1986. p.7

50 HORNSBY, J. 1993a. Both quotations p.178

51 HORNSBY, J. 1993a. p.180

in Hornsby's view is the use of the word action itself. She considers the simple event of someone switching on a kettle, this entails 'neuronal firings, signals going out to the nerves, muscles contracting.' But in Hornsby's opinion this more reductionist view will not be all there is to action. Action may also include 'a whole collection of events leading from some happening in the depth of Peter's [the kettle operative's] brain all the way to an event beyond his body in which his desire's being satisfied consists.' Whilst reductionist views encompass and may identify the commencement of an action, they cannot define the finishing point of an action. Hornsby argues that it is this distinction which is relevant to agency. The finishing point of an action draws the line between the 'action and its effect'. Here she suggests the philosophical debate over the meaning of words which define when an action begins. The common sense notion that 'people do things (for reasons),' is the subject of debate. Hornsby herself argues that 'bodily movements are effects of actions', not the action itself.^{52 53}

In defining involuntary action it seems the law is concerned with defining a part of the constituents of responsibility which establish agency,⁵⁴ or on another view with imposing a rational explanation for the defendant's actions. Once the voluntary act requirement is met the law considers a broader personal account of action, but in determining voluntary action it

52 HORNSBY, J. 1993a. p.174-5. All quotations

53 Hornsby concludes:

So there are questions about how nervous systems can subserve the phenomena of mentality and agency. But these questions are not made easier by the assumption that, to everything we speak of from the personal point of view, there attaches a piece of vocabulary apt for describing things impersonally. This assumption after all is the source of the thought that actions are swallowed up from an external perspective, and of the thought that the mental is epiphenomenal. And it is not as if the assumption on its own could do anything to integrate the personal with an impersonal point of view. Davidson himself has made this clear: in the sphere of reason-explanations, causality is 'connected with the normative demands of rationality' (Davidson 1985, p.246).

There is then no new problem about integration when the assumption is abandoned, and actions are thought neither to be swallowed up nor deprived of genuinely causal explanations, but absent simply, from the impersonal point of view. When we see an action as a person's initiating a series of events, we recognize a type of event whose causal ancestry is understood from a personal, rational point of view, and whose causal successors come to be understood from an impersonal, perhaps scientific one. And we appreciate that causality is a concept that we may operate with from both points of view: people make a difference, and do so because their actions are events which make a difference.

HORNSBY, J. 1993a. p.184-5

54 See discussion of this in chapter 5

seeks to establish whether the bodily movement was willed. It is questionable whether such an action requirement can establish voluntariness or agency. Hornsby suggests that what is relevant to responsibility is 'the actions being ours'. She also suggests that 'where the ideal of rationality is used' the answer to whether an actor is responsible lies in the 'agent's thoughts and wants.' She concludes that it is possible to view actions both impersonally and personally but in reality the evaluation of action is a mix of the two, 'the causal ancestry', the rational explanation for an action is only accessible from the personal viewpoint, either of the observer or the actor. What follows is observable scientifically. On this view the problem for the law in defining responsibility by means of willed bodily movement becomes clearer. It is not possible to capture the causal, rational part of action from a totally impersonal point of view.

In making evaluations of responsibility the courts have to consider whether the act of the accused was voluntary or involuntary.⁵⁵ This assessment is based not only on the test of willed bodily movement, but on whether the actor was conscious. The willed bodily movement requirement is a reductionist test in that, theoretically, it excludes from the evaluation of responsibility the reasons an individual has for acting. One of the most difficult areas of evaluation in relation to automatic states lies in states of partial consciousness where the defendant has carried out a series of apparently purposeful acts of which she claims she was not consciously aware, that her behaviour lacked voluntariness. It is difficult for juries to determine this on a purely mechanistic account of action. In Lord Denning's words to decide whether 'an act has been done by the muscles without any control by the mind.'

Partial consciousness and involuntary action

Does Lord Denning's view of automatism encompass states of partial consciousness? Lord Denning defined involuntary acts as 'not conscious', his examples were an 'act done while suffering from concussion or sleepwalking.' Did Lord Denning mean such people were unconscious of their 'actions' or not consciously aware of their actions? It may be intuitive but, human experience leads to the belief that 'acts' are carried out with varying degrees of consciousness and there is neuroscientific evidence to support the idea that the conscious

⁵⁵ If this distinction is raised in her defence

awareness of 'acts' varies. Greenfield explains the experience of consciousness as a potential property of groups of neurons, and the varying degrees of consciousness in terms of neuronal gestalts. A gestalt of neurons occurs, in her view, when 'certain groups of brain cells are linked and become active at the expense of others.' The larger the neuronal gestalt, the more neurons excited by some stimulus, the deeper the conscious experience.⁵⁶ Thus, Greenfield provides an explanation of conscious experience that is not located in any particular area of the brain and which varies according to the degree of stimulus and arousal within the brain. In this manner neuroscientific research can provide support for arguments that 'acts' are carried out with varying levels of consciousness. Lord Denning in his consideration of states where the defendant was not conscious of what he was doing, gave as examples, sleepwalking and concussion.

But are the actions of those who are asleep or concussed, unconscious according to medical or neuroscientific explanations? Blair,⁵⁷ a consultant psychiatrist, sees automatism as a 'syndrome of symptoms which occurs in various conditions that involve a disturbance of consciousness.'⁵⁸ A state of clouded consciousness where the individual's normal ability to control his behaviour is impaired. He reviews the two causes of automatism described by Lord Denning: concussion and somnambulism. According to Blair these may result in illegal behaviour as a result of the disturbance 'of the delicate and coherent relationship between the various components of the individual's body and mind to ensure his harmonious awareness of himself as an entity, of the realities of his environment and of his abilities to control his behaviour.'⁵⁹ Of the concussed actor Blair writes:

A concussed person may indulge in threatening, insulting or aggressive acts of a silly type or if concussed while driving an automobile continue on his way dangerously. On the other hand, it is seldom that such cases indulge in seriously aggressive crimes unless they develop a state of frenzy or proceed to drink alcohol. (McCaldon, 1964). In the latter category recovery may entail a passage through stupor, delirium and clouding before consciousness is fully regained. During the stages of delirium or cloudiness the

56 GREENFIELD, S. 1995. p.161

57 BLAIR, D. 1977. The Mediological Aspects of Automatism, (1977) 17 (3) *Med Sci Law*, 167-82

58 BLAIR, D. 1977. p.167

59 BLAIR, D. 1977. p.167

patient, if at large, may commit a really serious criminal act such as assault, violence or homicide.

To summarize, post-concussional automatism is a real entity which may give rise to stupid, irresponsible and illegal behaviour but seldom to major sexual or violent crimes.⁶⁰

Similarly with regard to sleepwalking or somnambulism Blair describes the state of automatism as follows:

Whilst somnambulism persists, the subject's consciousness is in sleepy abeyance and he is unaware of his actions and on waking remembers nothing of them. He is, therefore, in a state of automatism. It is almost unknown for somnambulists to injure themselves and whereas they may in that state of mind behave in an odd and sometimes illegal way they do not often indulge in serious crimes. Nevertheless, violent and even homicidal crimes have been committed by a person in a state of somnambulism (automatism) (Podolsky, 1960; Morce, 1968).⁶¹

Similarly, Nunn, a consultant psychologist, would dispute that sleep is an unconscious state:

People tend to think of themselves as habitually losing consciousness for eight hours, or whatever, out of every twenty-four. This is not in fact the case. What happens is that we lose immediate awareness of events in the external world, we lose the sensation of being able to direct our attention at will and we have few clear memories of what we experienced while we were asleep. However, people woken up from so-called rapid eye movement (REM) sleep always report awareness of vivid mental activity (dreams), and even those woken from slow wave sleep often recall awareness of having been engaged in cogitation or the like. Moreover, unusual percepts do tend to get through and are often woven into the material of dreams most people, when a blanket has slipped off their feet in cold weather, will have had the experience of dreaming that they were wading through snow or something of that sort.⁶²

On this view then Lord Denning's definition of involuntariness cannot be based on an equation of involuntariness with unconsciousness. North P. in *R v Burr* acknowledged this when he says of Lord Denning's comments that:

60 BLAIR, D. 1977. p.173-4

61 BLAIR, D. 1977. p.181-2

62 NUNN, C. 1996. *Awareness, What it is, What it does*. London: Routledge. p.19

I think it should be made plain that when Lord Denning speaks of ‘an act which is done by the muscles without any control by the mind’, he does not mean that the accused person must be absolutely unconscious because you cannot move a muscle without a direction given by the mind. What his Lordship in my opinion was saying is that all the deliberative functions of the mind must be absent so that the accused person acts automatically.⁶³

It is questionable whether Lord Denning meant that all deliberative functions of the mind should be absent, but he seems to have had in mind a state where conscious appreciation of what the defendant was doing was substantially impaired. North P. puts forward a concept of human action where each act is deliberated. Neuroscientific evidence, philosophical argument and intuitive experience suggests that this is not how most ‘action’ occurs. Lord Denning actually says ‘one who is not conscious of what he is doing’, and then uses concussion and sleepwalking as examples of states in which such a lack of consciousness might occur. Sleepwalking and concussion are not seemingly states of unconsciousness but states of clouded consciousness. Lord Lane, in the Court of Appeal in *AG’s Reference (No 2 of 1992)*, reviewing Lord Denning’s comments, said that the defence of automatism required ‘a total destruction of voluntary control on the defendant’s part. Impaired reduced or partial control is not enough.’⁶⁴ Yet it is clear that both sleepwalking and concussion are conditions of clouded consciousness or partial control.⁶⁵ As was argued previously a different approach has been taken to automatism in driving cases, and *AG’s reference (No 2 of 1992)* is a driving case. In *Quick*⁶⁶ a differently constituted Court of Appeal had taken the view that a defendant in a semi-conscious state, resulting from hypoglycaemia, might have a defence of automatism.

What the law seems to be searching for here is a definition of when a person is the author of his actions or as was said in *HM Advocate v Ritchie*⁶⁷ ‘[t]he question accordingly which you have to determine is whether, at the time of the accident, the accused was or was not the

63 [1969] NZLR 736, 745

64 [1993] 4 All ER 683, 687

65 Sleepwalking has been accepted, by the courts as founding a defence of automatism, albeit insane automatism

66 *R v Quick* [1973] 3 WLR 26

67 1926 SLT 308

master of his own action. So put the question becomes a pure question of fact.’ Or as was said by Lord Hope in *Ross v HM Advocate*,⁶⁸ automatism occurs when ‘the accused, while not insane is said to have no control over his actions.’ Involuntary action on this description is a lack of sufficient consciousness to control movement.

Fenwick, a neuropsychiatrist, raises an interesting question regarding consciousness and the length of time of any episode of involuntariness.⁶⁹ Speculating that it is possible for an ‘act’ which would attract criminal liability to be caused by a very transitory mental event, for example an epileptic spike that could occur in the space of a 100 milliseconds (ms or msec.), he asks whether in fact the perpetrator of such an act could in any meaningful way be consciously aware of what she was doing. He concludes, on the basis of the decision in *Kemp*,⁷⁰ that automatism caused by an epileptic aura which might last for seconds would be sufficient for a finding by the courts of insane automatism. In these short time scales he argues that ‘the act would have taken place before it reached consciousness.’⁷¹ He bases this comment on the work of Libet which suggests that consciousness of acting only arises after some 400-500ms, and concludes that: ‘[j]udges have long rejected the concept of irresistible impulse; the time may be approaching, however, when a defence of insanity due to an ‘unconscious’ (and therefore irresistible) impulse is again respectable.’⁷²

Libet has revised his estimate of how long it is before human beings become ‘aware of intention to act’ this is now stated as being 350-400ms after ‘readiness potential’ (RP) is noted in the brain, but only ‘200ms before the motor act.’⁷³ But the basis of his argument is still very much as Fenwick has expressed it. What is questionable is whether Libet’s research could be

68 1991 SLT 564, 571

69 FENWICK, P. 1993. Brain, Mind and Behaviour. *British Journal of Psychiatry*. 1993, vol. 163, 565-73

70 [1956] 3 All E.R. 249, 253 Devlin J. stated that the M’Naghten Rules applied to arteriosclerosis which was a ‘disease of the mind’. Devlin J. stated that once the defendant was said to be suffering from a ‘disease of the mind’ under the M’Naghten Rules it mattered not ‘whether the disease is curable or incurable, or whether it is temporary or permanent’

71 FENWICK, P. 1993. p.568

72 FENWICK, P. 1993. p.568

73 LIBET, B. 1999. Do We have Free Will? *Journal of Consciousness Studies*, 1999, vol. 6, no. 8-9, 47-57

put to the purposes proposed by Fenwick at the present.⁷⁴ It is also questionable whether such proof would make irresistible impulse respectable, or simply prove that in Hornsby's words ownership of the act was absent. If ownership is absent there is no actor available to resist the impulse. According to Libet:

The initiation of the freely voluntary act appears to begin in the brain unconsciously, well before the person consciously knows he wants to act! Is there, then, any role for conscious will in the performance of a voluntary act? ... To answer this it must be recognized that conscious will (W) does appear about 150 msec. before the muscle is activated, even though it follows onset of the RP. An interval of 150 msec. would allow enough time in which the conscious function might affect the final outcome of the volitional process. (Actually, only 100 msec. is available for any such effect. The final 50 msec. before the muscle is activated is the time for the primary motor cortex to activate the spinal motor nerve cells. During this time the act goes to completion with no possibility of stopping it by the rest of the cerebral cortex.)

Potentially available to the conscious function is the possibility of stopping or vetoing the final progress of the volitional process, so that no actual muscle action ensues. *Conscious-will could thus affect the outcome* of the volitional process even though the latter was initiated by unconscious cerebral processes. Conscious will might block or veto the process, so that no act occurs.⁷⁵

Thus Libet provides an explanation of how consciousness may control movement. This view of consciousness is clearly relevant to the basis of legal responsibility. As a construction of bodily movement it challenges the legal conception of willed bodily movement as expressed by Austin and Moore, where volitions perform an executory function in initiating muscular contractions. It is also relevant to questions of responsibility which will be further discussed in the next chapter.

Confining the discussion for the moment to what an action might be from this perspective a description may be obtained of the commencement of movement as being unconscious and emerging to a level where conscious appreciation of the potentiality to act occurs immediately prior to the movement itself occurring. On the Libet formulation this gives sufficient time for movement to be vetoed by the brain. A note of caution needs to be sounded here. This is a

⁷⁴ See Churchland's comments regarding the possibility of neuroscience being this accurate earlier in this chapter p.150

⁷⁵ LIBET, B. 1999. p.51-2. Emphasis in the original

persuasive explanation of movement and fits with basic intuitions as to what movement might be, but all neuroscientific explanations of the brain are hypotheses. Hypotheses which are more or less convincing and certainly lead to more informed judgements as to what may be occurring when movement takes place. As Richard Dawkins points out scepticism about some of the conclusions drawn from scientific experiments may be valid, but that does not invalidate the cumulative knowledge of scientific experiment.

Let's keep a sense of proportion about this! Yes, there's much that we still don't know. But surely our belief that the earth is round and not flat, and that it orbits the sun, will never be superseded. That alone is enough to confound those, endowed with a little philosophical learning, who deny the very possibility of objective truth: those so-called relativists who see no reason to prefer scientific views over aboriginal myths about the world.⁷⁶

What it seems science is able to do, is to provide evidence that the initiation of movement is largely a subconscious process. However, there is evidence that actors become aware of the potentiality for movement in time to prevent an 'act' occurring if it is perceived to be an inappropriate response. Libet sees his thesis⁷⁷ as limited to proof that there is normally a potential to inhibit 'action', immediately prior to that action occurring:

We should also distinguish between *deliberations* about what choice of action to adopt (including pre-planning of when to act on such a choice) and the final intention actually 'to act now'. One may, after all, deliberate all day about a choice but never act; there is *no voluntary act* in that case. In our experimental studies we found that in some trials subjects engaged in some conscious pre-planning of roughly when to act (in the next second or so). But even in those cases, the subjects reported times of the conscious wish to actually act to be about - 200 msec.; this value was very close to the values reported for fully spontaneous voluntary acts with no pre-planning. The onset of the unconscious brain process (RP) for preparing to act was well before the final conscious intention 'to act now' in all cases. These findings indicated that the sequence of the volitional processes 'to act now' may apply to all volitional acts, regardless of their

76 DAWKINS, R. *Science Delusion and the Appetite for Wonder*, Richard Dimbleby Lecture, 12th November 1996, BBC1. Transcript available at http://www.edge.org/3rd_culture/dawkins/lecture_pl.html (7.10.2000)

77 LIBET, B. 1985. Unconscious cerebral initiative and the role of conscious will in voluntary action. *The Behavioral and Brain Sciences*, 1985, vol.8, 529 -539. For a peer group discussion of Libet's thesis see *The Behavioral and Brain Sciences*, 1985, no. 8, p.539-66 and the *Journal of Consciousness Studies*, 1999, vol.6. no 8-9

spontaneity or prior history of conscious deliberations.⁷⁸

In this manner science may inform our judgements about what involuntary action might be but its finding should not be treated as certainties, but neither as Dawkins points out should the evidence it provides be ignored. Scientific conjecture may provide a better explanation of events than blind ignorance. The real danger lies in juries assessing expert evidence as if it were absolutely incontrovertible. Thus the law needs to achieve a framework for defining involuntary action which permits juries adequately to assess evidence of involuntariness and action. Collins and Pinch, in their discussion of the use of scientific evidence in court, argue that this may entail the use of more scientific evidence and not less. They also stress the need for an equality of expert opinion examining both sides of the argument so that the jury obtains a clear idea of the debate.⁷⁹

Libet's thesis satisfactorily answers some of the problems raised by legal commentators regarding the lack of reality in the willed bodily movement concept. This is particularly true in cases of spontaneous action, which philosophers also have problems explaining when they base their definitions of acting upon a concept of intentional planning. This problem was well expressed by Bratman during the symposium discussion following the publication of Moore's book, *Act and Crime*.⁸⁰ Bratman subscribes to the idea that a key feature of action which identifies it as separable from other human behaviours is intentionality, but he has problems in relating this belief to cases of spontaneous action.

Consider, first the cases of spontaneous voluntary action. Suppose you unexpectedly throw a ball to me and I spontaneously reach up and catch it. My catching it is under my control and voluntary ... But my action is relatively automatic and unreflective, so it may be strained to suppose its etiology must involve a distinct attitude of intending

78 LIBET, B. 1999. p.54

79 The problems of scientific theories and the use of expert evidence in court are entertainingly discussed by COLLINS, H. & PINCH, T. 1993. *The Golem*. Cambridge University Press. Particularly p.141 to 151

80 MOORE, M. 1993 p.4. For a full discussion of Moore's thesis see the following articles in (1994) 142 *UPLR* FLETCHER, G.P. 1994; CORRADO, M. 1994. Is there an Act Requirement in the Criminal Law? 1529-61; GOLDMAN, A.I. 1994. Action and Crime: A Fine Grained Approach. 1563-86; MORSE, S.J. 1994. Culpability and Control. 1587-1660; WILLIAMS, B. 1994. The Actus Reus of Dr Caligari. 1661-1673; AUDI, R. 1994. Volition, Intention, and Responsibility. 1675-1704; BRATMAN, M.E. 1994. Moore on Intention and Volition. 1705-1718; HORNSBY, J. 1994. Action and Aberration. 1719-1747

given that we are understanding intending largely in terms of its role in planning. But we still have a voluntary act requirement. If instead of catching a ball, I were to punch you in the nose, I would be subject to punishment.

I am unsure exactly what to say about such cases. Perhaps such spontaneous actions are best characterised as voluntary and goal directed, but not intentional (though not unintentional either). Making room in this way for actions that are voluntary but neither intentional nor unintentional would allow us to hold onto the idea that intentional action is always grounded in some intention. It would still entail that actions that satisfy the voluntary act requirement may involve no intention, and that is a conclusion that Moore could not accept.⁸¹

On the Libet definition of voluntary action this problem ceases to exist. The initiation of the action is unconscious, but once it has entered conscious awareness, although spontaneous, it is a voluntary act assuming that the actor is able to veto the action which follows. On the Libet explanation what would make action involuntary would be the inability to form the minimal intention required to restrain action in this way.⁸² It should be noted that Libet provides a more reductionist explanation of behaviour than that favoured by Nagel and Hornsby. The Libet formulation does not focus on all the reasons that an actor had for acting but simply on the question of whether the actor had the ability to veto or approve the plan of action already formed in his unconscious. It is measure of the ability to exercise control but it is not dependant on physical or mental divisions of the body and is the more convincing as an explanation because of this fact. Put simply Libet's experiments suggest that the question regarding whether an action is involuntary may be best expressed as whether there was an ability to veto action. It is suggested that such a suggestion captures the criminal law requirement of involuntariness. An action is involuntary when there is a total inability to act otherwise.⁸³

Philosophy and neuroscience

This scientific explanation of action is closer to the manner in which the ordinary man would explain action. It seems intuitively more acceptable to explain consciousness in relation to

81 BRATMAN, M.E. 1994. p.1712

82 For the problems of assessing apparently purposeful behaviour see WILLIAMS B. 1994. p.1661-73

83 For further discussion of this see SIMESTER, A.P. 1998. On the So-called Requirement for Voluntary Action. (1998) 1 *Buffalo Criminal Law Review* 403-30

movement⁸⁴ as the ability to stop the movement once the individual is aware that it will take place, rather than consciousness in relation to a volition for the muscular contractions which commence each movement. The problem of consciousness which is being considered is what Searle calls the fourth problem of consciousness: that is the explanation of 'how mental events can cause physical events. How, for example, could anything as "weightless" and "ethereal" as a thought give rise to action?'⁸⁵

Searle examines the structure of human action in his fourth Reith Lecture, and expresses reservations about adopting a purely scientific account of action.⁸⁶ He begins by establishing that 'types of actions or behaviour' cannot be identified with 'types of bodily movements.' His justification for this is that 'one and the same set of bodily movements might constitute a dance, or signalling, or exercising, or testing one's muscles, or none of the above.'⁸⁷ He then sets out to analyse other features of action. He notes that 'actions seem to have preferred descriptions.' He ties his construction of action to an imaginary walk in Hyde Park.

If I am going for a walk to Hyde Park, there are any number of other things that are happening in the course of my walk, but their descriptions do not describe my intentional actions, because in acting, what I am doing depends in large part on what I think I am doing. So for example, I am also moving in the general direction of Patagonia, shaking the hair on my head up and down, wearing out my shoes, and moving a lot of air molecules. However, none of these other descriptions seems to get at what is essential about this action, as the action it is.

A third related feature of actions is that a person is in a special position to know what he is doing. He doesn't have to observe himself or conduct an investigation to see which action he is performing, or at least is trying to perform. So, if you say to me: 'Are you trying to walk to Hyde Park or trying to get closer to Patagonia?' I have no hesitation in giving an answer even though the physical movements that I make might be appropriate for either answer.

It is also a remarkable fact about human beings that quite effortlessly we are able to identify and explain the behaviour of ourselves and of other people. I believe that this

84 It could be said that it might be easier not to talk of consciousness in relation to bodily movements at all. However, the willed bodily movement model in talking of a volition preceding bodily movement appears to be envisaging some sort of consciousness of the commencement of each movement

85 SEARLE, J. 1984. p.25

86 SEARLE, J. 1984. p.57-70

87 SEARLE, J. 1984. p.57

ability rests on our unconscious mastery of a certain set of principles, just as our ability to recognise something as a sentence of English rests on our having an unconscious mastery of the principles of English grammar. I believe there is a set of principles that we presuppose when we say such ordinary commonsense things as that, for example, Basil voted for the Tories because he thought that they would cure the problem of inflation, or Sally moved from Birmingham to London because she thought the job opportunities were better there, or even such simple things as that the man over there making such strange movements is in fact sharpening an axe, or polishing his shoes.

It is common for people who recognise the existence of these theoretical principles to sneer at them by saying that they are just a folk theory and that they should be supplanted by some more scientific account of human behaviour. I am suspicious of this claim just as I would be suspicious of a claim that said we should supplant our implicit theory of English grammar, the one we acquire by learning the language. The reason for my suspicion in each case is the same: using the implicit theory is part of performing the action in the same way that using the rules of grammar is part of speaking. So though we might add to it or discover all sorts of interesting additional things about language or about behaviour, it is very unlikely that we could replace that theory which is implicit and partly constitutive of the phenomenon by some external 'scientific' account of that very phenomenon.⁸⁸

Thus for Searle there is 'more to types of action than physical movements' actions have 'preferred descriptions'. In his view 'people know what they are doing without observation and the principles by which we identify and explain action are themselves part of the action, that is they are partly *constitutive* of actions.'⁸⁹ To Searle in explaining human behaviour the key feature is intentionality. However, whether his description of intentionality is the same as other philosophical descriptions of intentionality is a moot point and one that cannot be discussed by this thesis. Before considering Searle's explanation of behaviour it is necessary briefly to consider the constructions of action by philosophers generally. It is within this philosophical framework that Searle's explanation has its roots.

The philosophy of human action and the criminal law

Searle argues that by explaining human behaviour in terms of the 'mental' and the 'physical', 'two mutually exclusive territories' philosophers have 'a hopeless map' and they will 'never

88 SEARLE, J. 1984. p.58-59

89 SEARLE, J. 1984. p.59. All quotations. Emphasis in original

find' their 'way about'.⁹⁰ Whilst he might agree with White that '[t]he important philosophical questions about action concern its nature, its description and its explanation',⁹¹ Searle would not agree with many legal theorists or philosophers of action about the route that they take to achieve this. Philosophers acknowledge that conceptions of action are directly linked to concepts such as responsibility, blame, good and evil,⁹² though the precise nature of this link is the subject of debate.⁹³ For Moya the questions regarding the philosophy of action concern consistency.

Those who doubt the existence of actions are not questioning what everyone can perceive. They are rather wondering whether concepts we ordinarily use to describe and interpret those observations are appropriate and ultimately consistent ... if action is an inconsistent concept, there cannot be actions just as there cannot be squared circles. So, analysis of the concept of action itself is a main topic of the philosophy of action.⁹⁴

In order to make evaluations of responsibility philosophers traditionally have sought to identify a mental cause of events which could result in action. In doing this one of the major problems for action theorists is the philosophical problem of infinite regress, which in terms of action is the need to identify one act 'not a chain of causes extending further and further into the past', which makes it seem that there is nothing that 'we, as agents initiate, no action at all only further happenings.'⁹⁵ Some philosophers have tried to avoid this problem by identifying basic acts. Basic acts, aim to distinguish actions from happenings and attribute agency to action.⁹⁶

90 SEARLE, J.R. 1997. p.xiv

91 WHITE, A.R. 1968. *The Philosophy of Action*. Oxford University Press p.1

92 MOYA, C.J. 1990. *The Philosophy of Action*. Cambridge: Polity Press. p.2

93 See FEINBERG, J. 1965. Action and Responsibility in BLACK, M. (Ed.). 1965. *Philosophy in America*. London: Allen & Unwin, 134-60

94 MOYA, C.J. 1990. p. 2

95 MOYA, C.J. 1990. p.2. The problem of infinite regress was first posited by RYLE, G. 1963. *The Concept of the Mind*. Harmondsworth: Peregrine. p.65-6 'if my volition ... is voluntary, ... then it must issue from a prior volition and that from another *ad infinitum*.' Emphasis in original

96 See MOYA, C.J. 1990. Chapter 1

Danto summarises the problem of defining agency,⁹⁷ and seeks to resolve the problem by the use of the conception of basic action. Moya analyses this proposal of Danto's by applying the statement to the example of someone firing a gun. Moya suggests that by Danto's analogy moving a finger could be the basic action in the firing of the gun.⁹⁸ Danto describes a basic action as,

a is a *basic action* of m only if a is an action and there is no action distinct from and performed by m, which stands to a as a cause to effect. If the effect of an action distinct from itself, and b is performed by m, then b is a *nonbasic* action of m. Raising his arm is a *basic* action of m, if m does not cause his arm to rise; if he does cause it to rise, then it is a nonbasic action.⁹⁹

Moya argues this definition of action cannot distinguish between '[s]omeone moved his finger, and ... Someone's finger moved',¹⁰⁰ such as when someone moves their finger as a result of a spasm.¹⁰¹

Danto would not have accepted this argument, he wrote, '[s]ome of the chief difficulties philosophers have encountered in the theory of action are due to their having approached it from the point of view of the negatively abnormal. From that point of view, basic action is hopelessly mysterious.'¹⁰² For Danto actions could be caused to happen by either the body or the mind, but basic actions were not caused in this sense 'I sometimes just act ... directly, as when I perform basic actions'.¹⁰³

97 DANTO, A.C. 1968. Basic Actions. in WHITE, A.R. (Ed.). 1968. 43-58, p.51 'for suppose every action were a case of the agent causing something to happen. This means, each time he does a, he must independently do b, which causes b to happen ... This quickly entails that the agent could perform no action at all. If accordingly there are any actions at all of the sort described by "causing things to happen", there must be actions which are not caused to happen by the man who performs them.'

98 MOYA, C.J. 1990. p.14

99 DANTO, A.C. 1966. Freedom and Forbearance, in LEHRER, K. (Ed.). *Freedom and Determinism*. New York: Random House. p.48. Emphasis in original, quoted in MOYA, C.J. 1990. p.14

100 MOYA, C.J. 1990. p.15

101 This point is also made by Searle although he makes it in respect of all reductionist explanations of action

102 DANTO, A.C. 1968. p.54

103 DANTO, A.C. 1968. p.58

By contrast new volitional theorists look for the root of actions in states, such as tryings or attemptings. O'Shaughnessy supports his argument that tryings are distinct events by analysis of what Danto would call the negatively abnormal; the case of someone who through paralysis is unable to move his arm but still tries to move his arm. 'When a man intentionally raises his arm, trying to raise the arm causes the act neutral event of arm rising ... I think we can take this to be the sense of the perfectly harmless and intuitively obvious truth, that, when a man raises his arm by intent, then *he* brings about the movement of his arm. We can now say *how* he brings this about: it is by trying.'¹⁰⁴ McCann¹⁰⁵ and Hornsby similarly view tryings as causal events. Hornsby differentiates action from its results, '[a]ctions are peoples' doings of things, and what is done is never an action'.¹⁰⁶ Hornsby defines basic action as follows

We can ask whether there are descriptions of action so basic that they are free of any specific commitment to consequences like the body's movings_i, or the muscles contracting_i. Is there any type of events instances of which can be shown to occur before the muscles contract, and instances of which can be shown to be actions? I shall answer these questions "Yes" ... Every action is an event of *trying* or *attempting* to act, and every attempt that is an action precedes and causes a contraction_i of the muscles and a movement_i of the body.¹⁰⁷

It is on this view of tryings as basic to the causation of action that Moore bases his theory of action in his book *Act and Crime*. In his book Moore sets out to provide a theory to support his contention that there is a 'univocal act' requirement in the criminal law. He sees this theory as necessary to support the voluntary act requirement in codifications of the criminal law.

Why base criminal law descriptions of action on metaphysical concepts? Particularly concepts that are clearly contentious. Why distinguish between the mental and the physical? Shapira

104 O'SHAUGHNESSY, B. 1973. Trying (as the Mental "Pineal Gland"). *Journal of Philosophy*, 1973, vol. 70, 365-86, p.375. Emphasis in original. Quoted in MOYA, C.J. 1990. p.23

105 McCANN, H. 1974. Volition and Basic Action. *Philosophical Review*, 1974, vol. 83, 451-73

106 HORNSBY, J. 1980. *Actions*. London: Routledge & Kegan Paul p.4

107 HORNSBY, J. 1980. p.33. Emphasis in original. The definition of action which emerges is complex in the extreme, The letter _i is used to convey the fact that such happenings are non actional. Hornsby uses the letter _r to denote action which involves transitive movements, that is those movements described by a transitive verb. Subsequently Hornsby following the consideration of her theory by Moore M. comments, 'reading Moore has made me regret the use of "movement_r" which needs careful handling.' HORNSBY, J. 1994 p.1729

supplies an answer:

In the legal arena, there is one good practical reason for disregarding mental actions or, more precisely, for abstaining from ascribing operative significance to them: 'The thought of man is not triable, for the devil himself knoweth not the thought of men.' This practical rule, which is mainly derived from an evidentiary constraint, has misled many legal commentators into believing that a conceptual difficulty is at stake, namely, that mental actions are in some sense less of an action than physically overt ones. As a matter of fact, bans on mental actions, however hard to enforce, are not conceptually impossible. While secular legal systems are bound to assume that the internal realm is practically impervious to inspection, religious systems may rely on the divine ability to engage in such scrutiny and, therefore, they often punish 'evil thoughts.' It is not at all uncommon to ascribe moral significance to thoughts for the purposes of non-enforceable moral theories, relying on some moral feeling that *voluntas rep utabatur pro facto*.¹⁰⁸ Moreover, there are well-known historical examples of legal prohibition of thoughts as such, which were eventually excluded from criminal codes on grounds of liberty and privacy or because of the mentioned administrative difficulty. Eliminating the mental *Actus Reus* is therefore a contingent fact rather than a conceptual inevitability.

There is nothing wrong, of course, with an attempt to devise a special theory for 'legally acknowledged actions' that would exclude mental acts simply because they are not punishable in Anglo-American modern legal systems. Such an attempt, however, would run counter to the thrust of the policy seeking to establish criminal law largely on metaphysical grounds, and would also be inconsistent with the WBM [willed bodily movement] treatment of willed non-movements. A central theme of the WBM approach is that willed non-movements, due to compelling metaphysical considerations, cannot be considered actions even if they constitute an acknowledged source of criminal liability. In a pragmatic theory concerning the legal use of the technical term 'action,' this formulation would make no sense.¹⁰⁹

This line of argument merely supports Searle's argument that the creation of two mutually exclusive territories, the mental and the physical, serves to confuse more than it explains.

Another practical problem with the legal requirement that an act be voluntary is how to define such action so as not to conflict with the existing mens rea descriptions contained in offences. Conceptions such as tryings, beliefs and desires are in some philosophical descriptions tied to intentional states. However the law contains its own quite different and more restrictive

108 The use of the maxim '*voluntas rep utabatur pro facto*' meaning the will is to be taken for the deed was employed in England in the fourteenth century because 'the criminal law had become far too lenient in cases of murderous assaults which did not cause death.' POLLOCK, F. & MAITLAND, F.W. 1989 p.476n. Emphasis in original. Pollock and Maitland refer to this as 'a momentary aberration'

109 SHAPIRA, R. 1998. p.376-7

definition of intention, as defined in the mens rea of crimes requiring legal intention. Lawyers themselves disagree over the philosophical map within which they operate. There is no agreement amongst criminal lawyers as to whether the voluntary act requirement forms part of the mens rea or actus reus element of criminal offences. Smith views it as, 'a more fundamental element of criminal liability than the intention to cause, or foresight of the results of the act we normally think of as mens rea.'¹¹⁰ However, Norrie places it firmly in the actus reus category. 'The law of actus reus has as its central requirement that acts must be carried out voluntarily.'¹¹¹

Fitzgerald, argues that the problem for jurists is that they conflate two separate questions; '(1) what is an act? (2) when is conduct involuntary?' Fitzgerald suggests that

The problem of defining an act owes its importance partly to the constant recurrence throughout the common law of a certain theme, namely the requirement of an act ... This problem ... gains further significance from the recognition by the common law that ... involuntary conduct, does not involve the actor in any responsibility because it is said there is in reality no act on his part. For this reason it becomes necessary to define the term "act" to provide the test by which we can decide whether a man's conduct should involve him in any responsibility.¹¹²

In summary there is no uniform definition given within jurisprudence or the philosophy of action as to the nature of the voluntary act requirement. The law does make a distinction between the mental and the physical. Shapira suggests that jurisprudentially there is an attempt to give such definitions a metaphysical base. An approach he strongly repudiates. Though the approach of criminal law theorists may have been to take a reductionist approach to voluntary action some courts adopt a less reductionist approach to involuntariness in relation to the defence of automatism in that they see the evaluation of degrees of consciousness as relevant

110 SMITH, J.C. 1999. p.38

111 NORRIE, A. 1993. p.111

112 FITZGERALD, P.J. 1961. p.1

to criminal culpability.¹¹³

A metaphysical approach to criminal law definitions

In Moore's book *Act and Crime*, he reviews the metaphysical basis of the voluntary act requirement. Moore defines action in terms of willed bodily movements:

we end up, then, with the notion of an act as a willed bodily movement that is indeed the opposite (contrary or contradictory) of status, mental event, omission and involuntary bodily movement. If the two parts of this definition bodily movements and willings - themselves have a unitary nature, then so does the criminal law requirement that there be a willed bodily movement that is an act.¹¹⁴

Moore then sets out the 'serious metaphysical critiques' he needs to examine in order to prove that there is 'a univocal act requirement'. These are 'whether the act of my finger moving can be identical to the bodily movement of my finger moving, whether my mental state can cause an action, whether there are "volitions" or states of "willing" that can cause actions, whether basic acts like moving my fingers can be identical to more complex actions like killing.'¹¹⁵ It is not possible or necessary in this thesis to examine all of these questions in detail. Some of the criticisms of Moore's work will be briefly examined. However, prior to examining these criticisms a further question needs to be asked. Is there a univocal act requirement?

Norrie argues that though the law might aim at rationality and consistency it does not achieve

113 Note that in *R v Stone* Bastatrache J. took the view that consciousness and voluntariness are not synonymous. 'I therefore prefer to define automatism as a state of impaired consciousness, rather than unconsciousness, in which an individual though capable of action, has no voluntary control over that action.' (1999) 134 CCC (3d) 353, 417. He also said later 'voluntariness, rather than consciousness is the key element of automatistic behaviour since a defence of automatism amounts to a denial of the voluntariness component of the *actus reus*.' (1999) 134 CCC (3d) 353, 421. Emphasis in original. It is not clear what Bastatrache J. meant by these two statements as they show confusion as to the role of consciousness in the defence of automatism

114 MOORE, M. 1993. p.39-40

115 MOORE, M. 1993. p.43

its aim.¹¹⁶ He explains this is because:

the criminal law is neither rational nor principled so that the extraordinary is as much the norm as the ordinary. It is not that there is no rationality or principle in the law at all, but rather that the elements of reason and principle are constantly in conflict with other elements in the law itself. This means that the 'rationalising enterprise' is frequently rationalisation only in the pejorative sense of an apparent rationality papering over the cracks of deeper contradictions.¹¹⁷

Presumably Norrie therefore would not accept the possibility of a univocal act requirement. Indeed later in his book he writes:

The principles of responsibility upon which the law is based are given their particular shape by what is excluded from the subjective assessment of fault, and by the political interventions of the social elite charged with their development. That which is excluded, the subterranean forces of the political and the ideological, continually irrupts within the law, unsettling its formal appearance of consistency and disturbing its conceptual categories.¹¹⁸

Such an ad hoc or piecemeal law making process hardly seems likely to yield a univocal act requirement. Indeed it seems with regard to criminal law definitions of voluntary action that the practical realities of social protection policy have been particularly instrumental in the shaping of this component of criminal responsibility. However, this should not defeat the search for principle within the law from which rational judgment may be attempted, neither does Norrie deny that such attempts should be made. His concern is that the process should avoid 'papering over the cracks of deeper contradictions.'

Hart, who Moore criticises for undermining belief in a unitary condition of voluntary action,¹¹⁹ is arguing a completely different thesis from Moore. He sees lack of voluntary action as foundational to certain excusing conditions. Hart traces this argument back to Blackstone,

116 NORRIE, A. 1993. Chapters 1-3

117 NORRIE, A. 1993. p.110

118 NORRIE, A. 1993. p.110

119 See MOORE, M. 1993. p.40-3

who wrote that certain excuses were accepted because, 'the concurrence of the will when it has its choice either to do or avoid the act in question [is] the only thing that renders action praiseworthy or culpable'.¹²⁰

Hart's main argument concerning the voluntary act requirement revolves around his conception of justice. He suggests that the voluntary act requirement has been narrowed: 'in its admission of excuses it [the law] has concentrated almost exclusively on lack of knowledge rather than defects of volition or will.'¹²¹ Though he admits that to allow a defence based upon 'whether a person had sufficient capacity of will to conform to the law's requirements opens wider general issues and what shall count as evidence for or against is far from clear.'¹²²

In summary Hart's approach is that the concept of voluntary action has been narrowed in two ways. Firstly by judicial application of the mens rea principle: and secondly by the restriction of its operation to cognitive failures, rather than the inclusion of failures of volition. Interestingly, although Hart may have preferred an ordinary language definition of the word action, he suggests that the voluntary act requirement might act as a unifying principle. What concerned Hart was a 'universal idea of freedom or justice and the value of individual liberty.' He therefore argued '[w]hat is needed is a reinterpretation of the notion of desert and responsibility, a fresh account of the principle that a voluntary act should normally be required as a condition of liability to punishment.' This for Hart was expressed in the proposal 'unless a man has the capacity and fair opportunity to adjust his behaviour to the law its penalties ought not to be applied to him'.¹²³

However, Hart himself agrees that the means of proving such an assertion were far from clear.¹²⁴ If capacity is fundamental to liability how is it to be proved? Mackay agrees that capacity is 'a fundamental feature which distinguishes basic action from a mere bodily

120 Commentaries, Book IV, Chapt II, quoted in HART, H.L.A., 1968. p.174

121 HART, H.L.A. 1968. p.175

122 HART, H.L.A. 1968. p.176

123 HART, H.L.A. 1968. All quotations p.181

124 HART, H.L.A. 1968. p.176

movement such as a knee jerk reflex.¹²⁵ Mackay sees basic action as a useful tool in disentangling more complex action sequences. 'In a sense, therefore, a basic act is the irreducible minimum which is to be found in all cases of human action and requires us to focus attention on initial outward manifestations of complex human behaviour.'¹²⁶ Mackay substantiates the link between basic action and capacity with a quotation from Danto:

Behaviour becomes more uniform and culturally differentiated as the force of beliefs approaches zero, and hence responses verge on reflexes. Thus men spontaneously, and without reference to their beliefs withdraw their hands abruptly from hot irons. What keeps this a basic action and not a pure response is that it is capable of inhibition by a sufficiently determined person, concerned to show self control or demonstrate innocence at a witch trial, whereas no such options are available for the pre patellar reflex.¹²⁷

Capacity in this sense is the capability to inhibit bodily motion. This is not the broader sense of capacity advocated by Hart which saw the need for the evaluation of behaviour in a wider context.

The description is useful however because it focuses on the split second decision to act or refrain from acting that is relevant to criminal liability. The requirement that action be voluntary in this sense and as described by Libet is a fundamental requirement for the imposition of responsibility. There is one part of Danto's statement that needs refinement, that is his stipulation of self control, in terms of involuntariness as it relates to automatism, what is required is not control but the ability or capacity to exercise it.

Other action descriptions.

Moore's analysis of action was subject to stringent academic criticism at the symposium,

125 MACKAY, R.D. 1995. p.18

126 MACKAY, R.D. 1995. p.18

127 MACKAY, R.D. 1995. p.18. Quoting DANTO, A.C. 1973. *The Analytical Philosophy of Action*, Cambridge University Press. p.115

particularly by Hornsby,¹²⁸ who produced her own definition of a voluntary act for the purposes of criminal liability as '[t]here is an action if and only if there is an event of a person's intentionally doing something.'¹²⁹ By this definition 'intentionally' becomes central to the definition of action and the root of criminal liability. Hornsby argues that by this means Moore could avoid having to identify basic actions with bodily movements. An identity which she asserts is untenable, '[u]sing Moore's terminology, one says that an action is identical with a movement, when what one means is that a movement is part of an action.'¹³⁰ Hornsby rejects the need for volitions as a mediating state between beliefs and/or desires and action.

From my point of view, then Moore introduces a volition as a substitute for applying (to an event that is a person's moving a bit of her body) the concepts that enable us to see a person as an agent (who does things intentionally). If 'actions' can be adequately defined in the way I suggest, volitions must now be viewed as figments, filling an imaginary lacuna.¹³¹

Hornsby argues that Moore's volitions are tied to bodily movements and as such cannot attribute a sense of normal human agency,

And if people usually move their bodies without exercising any detailed bodily movement concepts, then someone voliting a bit of her body to move, ... will be rather rare. ... so the volition in his story [his analysis] cannot be allowed to be as uncommon as a common sense account of ourselves as agents would suggest.¹³²

This is not totally surprising as Moore based his explanation of action on what he sees as the Austin/Bentham construction of voluntary action. The problem is that the statement that an act is a willed bodily movement does not make clear what it is for action to be voluntary.

128 HORNSBY, J. 1994. p.1719-47

129 HORNSBY, J. 1994. p.1727

130 HORNSBY, J. 1994. p.1729

131 HORNSBY, J. 1994. p.1732

132 HORNSBY, J. 1994. 1734-5., This is very similar to Ryle's comments: 'However, when a champion of the doctrine himself is asked how long ago he executed his last volition, or how many acts of will he executes in, say, reciting "Little Miss Muffet" backwards, he is apt to confess to finding difficulties in giving the answer, though these difficulties should not, according to his own theory, exist.' RYLE, G. 1963. p.64

Bratman argues that Moore's theory has two prongs, 'both the idea that voluntary action must involve a bodily movement, and that the cause of the voluntary movement must be volition.'¹³³ Bratman reviews the second of these, the 'Mental Cause Thesis' and suggests that Moore's use of volition as a 'species of intention' is redundant. Bratman explains the fuller sense with which he endows intention by the example of raising an arm to signal for a cab. 'I would explain my arm raising by citing an appropriate relation to my relevant desire and belief. It is natural to suppose that this belief desire explanation is what insures (sic) that my arm raising is both *intentional* and done *with the intention* of signalling for a cab ... In this way we are led to see intention at least as it figures in action, not as a distinctive state of mind, but consisting of certain relations between actions, desires and beliefs.'¹³⁴ Bratman argues for a less reductive view of intention, particularly with regard to future intentions which may never be realised. For Bratman the issue which should be of concern to the criminal law, is the human ability to plan. 'I only claim that we - normal, adult human agents whose actions are the standard concern of the traditions of the criminal law at issue here - are planning agents, and this is central to the kind of agents we are.'¹³⁵ However, as noted previously, his model of action encounters difficulty with habitual or spontaneous action.¹³⁶

For the purposes of the law any description of action which does not encompass habitual or spontaneous action will be unusable because it cannot express the normative requirements of the criminal law. Furthermore, there are problems with basing arguments which seek to justify the criminal law requirement for voluntary action in the realm of metaphysics. Not the least of these problems is the fact that however well any metaphysical definition is argued it will always be open to philosophical criticism and debate. Perhaps this explains Duff's scepticism about the separation of actions into distinct events:

To ask which is 'the action itself' is as absurd as to ask what is 'the event itself' when the roof of the house is damaged in a storm - is there one event (the roof being damaged); or are there 'really' many events (each individual tile being damaged)?

133 BRATMAN, M.E. 1994. p.1705

134 BRATMAN, M.E. 1994, p.1707 Emphasis in original

135 BRATMAN, M.E. 1994, p.1709

136 See previous discussion earlier in this chapter p.165-6

Actions and events are identified and individuated only by our descriptions of them: what someone does can be described in various ways, drawing different distinctions between 'the action' and its circumstances or consequences, and which of these possible descriptions we offer depends not on some objective truth about what action really is (since there is no such truth), but on our own interests (and on the vocabulary available to us).¹³⁷

To conclude this section on legal and philosophical descriptions of human action, there is no agreement as to whether there is or is not a univocal voluntary act requirement, and if there is such a requirement what its definition might be. Most jurists subscribe to or at least debate the proposition that a voluntary action is a willed bodily movement.¹³⁸ However, the adoption of such a definition poses problems. Hart and Austin both noted that the definition does not fit easily with common language descriptions of events. Obtaining a satisfactory definition of action in metaphysical terms is difficult to achieve, will always be subject to criticism, and some doubt that it is possible. Feinberg suggests when attempting to answer the question, '[w]hat is the difference between a fully fledged human action and a bodily movement?', that the ultimate answers to certain metaphysical questions are beyond a definitive answer. 'Here as elsewhere in philosophy, analytical techniques help to answer the penultimate questions, while the ultimate ones being incapable of answer, must be come to terms with in some other way.'¹³⁹

Additionally the definition of action as a willed bodily movement is open to criticism as being too reductionist. This may be argued in two senses. Firstly a willed bodily movement does not successfully describe acts of omission, which are identified as culpable acts by the criminal law. Secondly it is difficult to describe all willed bodily movements as voluntary. Some instances of apparently purposive human action do not seem to fit within the popular view of voluntary conduct, for example sleep walking and epileptic fits.¹⁴⁰

Moore in seeking the simplest act description in order to provide the criminal law with a

137 DUFF, R.A. 1990. *Intention, Agency and Criminal Liability*. Oxford: Blackwell p.41

138 DUFF, R.A. 1990. p.41

139 FEINBERG, J. 1965. p.160. Both quotations

140 See HART, H.L.A., 1968. p.99-102

‘univocal’ act requirement, conflates two philosophical discussions of action and because of this confusion ensues. The first type of action is the description or actus reus, that is what ingredients which are the ‘acts’ of an accused constitute a crime. So shooting somebody dead, might supply the actus reus of murder. The discussion here may take two forms. Was the description, ‘shooting’ metaphysically an accurate description of a person’s act, clearly on the metaphysical descriptions above it is arguable that it would not be.¹⁴¹ The second form the discussion takes is that someone cannot be held responsible when she is not an agent. This again splits into two parts. The first requires that at some point after ‘acting’ there has to be a cut off point regarding the consequences for which an agent is to be responsible. The second is concerned with the question: was there agency in the sense of ownership of the action? Descriptions of action are further complicated because in considering the voluntariness of an action the reasons an agent has for acting or not acting become relevant. This is more apparent when somebody interferes and causes an actor to do something which she would not otherwise have done. For example someone else aims the gun an actor is holding and forces her to pull the trigger. In this case she is neither acting nor an agent. This case may be easier to envisage but this does not mean that when I have no mental reason to act as I do that such considerations become irrelevant and are subsumed into a ‘univocal’ act requirement. The jury has two considerations: did this person commit the series of acts called the actus reus, and if the matter is raised were these ‘acts’ voluntary?¹⁴² In this way agency, in the sense of the voluntariness/involuntariness of the action, becomes a more fundamental question in establishing criminal responsibility.

However at the level of attributing voluntariness to action, the sense of agency required is minimalist. It is not every act committed without reason which should be excused only those that the agent did not have the ability to control in accordance with her reasons for acting. This is still a reductionist conception of agency but not so reductionist as willed bodily movement. It asks for an evaluation of the agent’s capacity to control her movements. It is phrased in terms of her abilities to control her actions rather than her level of self control. This is an

141 For a detailed consideration of the metaphysics of action and agency see HORNSBY, J. 1997. *Simple Mindedness*. Cambridge, Mass.: Harvard University Press

142 The Australian court appears to have taken a similar approach in *Jiminez v The Queen*, where the defendant was clearly driving the car but fell asleep. The court felt the relevant consideration was whether his act was voluntary. See discussion of case chapter 3 p.136-9

important distinction vis à vis her responsibility as an agent.¹⁴³

The mental physical divide.

Is Searle correct in stating that treating the mental and physical as mutually exclusive provides a hopeless philosophical map? On some approaches both to philosophy and the criminal law agency is not simply a matter for consideration as part of the act requirement, but forms part of the mens rea conditions for criminal liability. Williams felt the willed bodily movement thesis could be confusing:

Considerable confusion reigns, both in ordinary and in legal speech, on what is meant by an act, or a voluntary act. The most acceptable language is to say that an act means willed bodily movement, so that if A pushes B against C and so causes C to fall over, we attribute the pushing of C to A not B. However, in a situation like this there is really no need to go into the meaning of act. If B were charged with assaulting C, or with murdering C in the event of C's death, the obvious defence would be lack of the mental element, and there would be no occasion to discuss whether B had 'acted'.¹⁴⁴

There is no doubt that some of the reasons, for acting are considered by the criminal law as mens rea items. Or that on the traditional legal view of action all reasons for bodily movement do not fall to be considered under the description of actus reus. Hornsby, felt that there were two alternative approaches to the problem and expounded what in her view might be the reasoning behind the differences in approach explained by Williams:

This distinction between two different ways of using *actus reus* shows up in a distinction between two possible places for a legal defence of automatism. Intuitively, such a defence makes the claim that the defendant's part in the putative crime was not the part of an agent, so that there could have been no actual crime. If *actus reus* is used so as [to] have application only when there is an action, then the defence would naturally come prior to any consideration of what specific things D might have done; for if the defence were successful, there could have been no *actus reus*. If, on the other hand, *actus reus* is used so that it is the 'pure', psychologically uncontaminated notion, then the automatism defence will be more or less on a par with other possible defences that appeal to particular aspects of *mens rea*. Questions about any *actus reus* could now be thought of as questions merely about whether an event in which D (or his

143 For further discussion of this point see chapter 5

144 WILLIAMS, G. 1983. p.146-7

body) participated led to some consequence - to someone's death, say; and the defence of automatism would amount to the claim that, although there was an *actus reus*, nevertheless D cannot be a criminal killer, because he did not satisfy certain psychological conditions at the time of the killing.

Different systems of criminal law, with their different rules of evidence, go different ways on this matter. But even if it is decided to use *actus reus* in the second, restrictive way - so that in the first instance, questions about *actus rei* come free from all questions about *mens rea* ... one may make a sharp division among requirements of culpability between those which are and those which are not psychological requirements. But it would be an error to suppose that this division could be founded in any distinction used in our ordinary practices of interpretation. In courts of law, there can be subtle questions about people's states of mind, and these questions may remain unanswered even when every question about *actus reus* in the restrictive sense seems to have been settled. But this legal situation must not encourage a picture by which our attitude to people is in the first instance as to automata, so that it is at a second stage that we turn to questions about their 'internal' or 'mental' states. Artificial principles that may be useful for analytical purposes may reveal nothing about our actual (human, moral) predicament.¹⁴⁵

This is a long quotation, but it highlights a very important distinction that needs to be made in the evaluation by the criminal law of what an involuntary act might be. Hornsby appears to be arguing that what is being judged, in cases of automatism, is a '(human, moral) predicament'; and that for the purposes of the criminal law it may be possible to separate psychologically culpable from other states of culpability. She seems to acknowledge that the application of such a specialist filter may indeed be necessary for the purposes of the criminal law. But she makes a strong plea for the retention of sufficient subjectivity in the judgement of action for the judgement to be meaningful. This is supported by comments in the minority judgment in *Rabey* 'I cannot accept the notion that an extraordinary external event, i.e. an intense emotional shock, can cause a state of dissociation or automatism, if and only if all normal persons subjected to that sort of shock would react in that way.'¹⁴⁶ Hornsby sees her second notion as most applicable to the law, she notes '[i]n considering whether a defence of automatism is appropriate, we seem not to be thinking so much about whether the agent had a motivating reason to do something she did, as about whether the agent was able to control her movements in accord with any such reason.'

145 HORNSBY, J. 1993b. On What's Intentionally Done. in SHUTE, S., GARDNER, G., & HORDER, J. (Eds.). *Action and Value in the Criminal Law*. Oxford University Press. p.62-3. Emphasis in original

146 [1980] 2 SCR 513, 548

Hornsby says: '[t]he idea that an action is a prerequisite of any ascription of legal responsibility may not most happily be understood in the context of a definition of 'an action' in which intentionality has entered.'¹⁴⁷ Hornsby makes this statement in the course of an essay evaluating Duff's explanation of intention.¹⁴⁸ Reading this essay and Hornsby's subsequent response to Moore's *Act and Crime*¹⁴⁹ it is clear that Hornsby feels that the problem with the evaluation of agency is the criminal law's designation of evaluations of agency as fitting within the act requirement. She is clear that evaluations of agency may not be obtained by incorporating the philosophical notion of intentionality within the act requirements of the criminal law.

Earlier, we considered the defence that D's part was not that of an agent at all ... It seems right to think of this defence as claiming that the minimal psychological notions appropriate to an imputation of responsibility have no application. But it is not at all obvious that the particular way of understanding the defence to which the philosophy of action will lead us - that nothing was intentionally done - is any improvement on an older idea, where the claim was that there was no voluntary act. In considering whether a defence of automatism is appropriate, we seem to be involved in thinking not so much about whether the agent had a motivating reason to do something she did, as about whether the agent was in a position to control her movements in accord with any such reason. The idea that an action is a prerequisite of any ascription of legal responsibility may not be most happily understood in the context of a definition of 'an action' in which 'intentionally' has entered.¹⁵⁰

Again, despite the problems of the conceptual map, what emerges is that in the case of automatism what is relevant is the ability to control action. This ties back to the concerns that she has previously expressed about agency and the opaqueness of agency from the objective viewpoint. She questions 'whether the introduction of "an action" actually does supply the materials needed' for finding a mental requirement within the act requirement. She points out that this is controversial, '[s]leepwalkers and people under the influence of hypnotism (for instance) may not exhibit the kind of voluntariness involved in general mens rea, but their

147 HORNSBY, J. 1993b. p.71

148 See DUFF, R.A. 1990, but more particularly see DUFF, R.A. 1993. *Acting, Trying, and Criminal Liability*, in SHUTE et al. (Eds.). 1993. Hornsby particularly refers to p.78

149 HORNSBY, J. 1994. 1719-1747

150 HORNSBY, J. 1993b. p.71

deeds seem to be actions none the less.¹⁵¹ Hornsby again seems to be expressing doubts as to whether the action requirement of the criminal law can mesh with the philosophical definitions. The reason it will have difficulties is twofold. Firstly, because of the need in the criminal law to impose responsibility for actions and the linked problem of where responsibility for action begins and ends. Secondly and more relevantly to questions of involuntariness, Searle would argue that further problems will arise with the separation of the mental from the physical in action descriptions. On this view criminal jurists are not merely employing difficult philosophical concepts: they are utilising the wrong map in trying to understand them.

Both Hornsby and Nagel express concerns about the introduction of excessive artificiality into the principles of the evaluation of responsibility. Nagel suggests excessive objectivity simply reduces the effectiveness of ethical judgements:

There is a problem of excess objectivity also in ethics. Objectivity is the driving force of ethics as it is of science: it enables us to develop new motives when we occupy a standpoint detached from that of our purely personal desires and interests, just as in the realm of thought it enables us to develop new beliefs. Morality gives systematic form to the objective will. But escaping from oneself is as delicate a matter with respect to motives as it is with respect to belief. By going too far one may arrive at skepticism or nihilism; short of this there is also a temptation to deprive the subjective standpoint of any independent role in the justification of action.¹⁵²

One explanation for the minimalist approach to subjective experience found in the criminal law definition of involuntary action is the fact that the law is normative. Voluntariness is said by the courts in England and Wales to be fundamental to criminal liability. Therefore the legal construction of involuntary action is likely to reflect the values inherent within the legal system. The criminal law is also a system which requires gradations of culpability, in order to make gradations it divides human behaviour into somewhat counterintuitive divisions. However, in order to make sure these divisions function effectively it is necessary that the compartments relate as nearly as possible to modern jury conceptions of behaviour so that an

151 HORNSBY, J. 1994. p.1726. Emphasis in original. For a discussion of the problems of purposeful action see WILLIAMS, B. 1994. 1661-1673, and more generally, WILLIAMS, B. 1995. *Making Sense of Humanity*. Cambridge University Press. The problem of purposive action will be further discussed in the next chapter

152 NAGEL, T. 1986. p.8

understanding of what they are being asked to evaluate becomes possible. Before leaving the philosophical discussion of action it will be helpful to consider a philosophical explanation of action which employs a different conceptual map.

Searle and the structure of human behaviour

The key to understanding the structure of human behaviour according to Searle is 'intentionality'. Searle distinguishes intending from intentionality. He defines intentionality in the following way:

To say that a mental state has intentionality simply means that it is about something. For example, a belief is always a belief that such and such is the case, or a desire is always a desire that such and such should happen or be the case. Intending, in the ordinary sense, has no special role in the theory of intentionality. Intending to do something is just one kind of intentionality along with believing, desiring, hoping, fearing and so on.

An intentional state like a belief, or a desire, or an intention in the ordinary sense, characteristically has two components. It has what we might call its 'content', which makes it about something, and its 'psychological mode' or 'type'. The reason we need this distinction is that you can have the same content in different types. So, for example, I can want to leave the room, I can believe that I will leave the room, and I can intend to leave the room. In each case, we have the same content, that I will leave the room; but in different psychological modes or types: belief, desire, and intending respectively.¹⁵³

In Searle's explanation of action, as it is in many philosophical constructions of action, intentionality is central.¹⁵⁴ The content of mental states is seen as important because it is how individuals form representations of the world. They enable individuals to 'represent how it [the world] is, how we would like it to be, how we fear it may turn out, what we intend to do about it and so on.'¹⁵⁵

153 SEARLE, J. 1984. p.60

154 However, this does not mean that Searle's explanation of 'intentionality' is a universally accepted philosophical concept. See for an alternative viewpoint DENNETT, D. *Intentional Systems*. *Journal of Philosophy*, 1971, vol. 68, reprinted in LYONS, W. (Ed.). 1995. 191-213

155 SEARLE, J. 1984. p.60

What Searle describes next is how intentional states 'cause things to happen'. Causation occurs when an 'intentional mental state' coincides with the 'state of affairs' which it represents.

In Searle's example of 'going to the movies':

In such cases there is an internal connection between the cause and the effect, because the cause is a representation of the very state of affairs that it causes. The cause both represents and brings about the effect. I call such kinds of cause and effect relations, cases of 'intentional causation'. Intentional causation as we will see, will prove crucial both to the structure and to the explanation of human action. It is in various ways quite different from the standard textbook accounts of causation, where for example one billiard ball hits another billiard ball, and causes it to move. For our purposes the essential thing about intentional causation is that in the cases we will be considering the mind brings about the very state of affairs that it has been thinking about.¹⁵⁶

The strength of this explanation is that it offers an explanation to misquote Nagel of what it is like to perform an act. From this basic notion of intentionality Searle constructs a definition of human action based on eight principles.¹⁵⁷

The first principle is that actions 'characteristically consist' of a 'mental component and a physical component' and his second that the mental component must be 'an intention'. This second component in his words 'determines the success or failure in the action'. He gives examples of what in his view makes action unintentional.

The best way to see the nature of the different components of an action is to carve each component off and examine it separately. And in fact, in a laboratory, it's easy enough to do that. We already have in neurophysiology experiments, done by Wilder Penfield of Montreal, where by electrically stimulating a certain portion of the patient's motor cortex, Penfield could cause the movement of the patient's limbs. Now, the patients were invariably surprised at this, and they characteristically said such things as: 'I didn't do that - you did it.' In such a case, we have carved off the bodily movement without the intention. Notice that in such cases the bodily movements might be the

156 SEARLE, J. 1984. p.61

157 These principles are outlined by SEARLE, J. 1984. p.63-70. Unless otherwise stated the quotations that follow are taken from these pages and are contained in the explanations that follow the assertion of each of the principles

same as they are in an intentional action, but it seems quite clear that there is a difference. What's the difference? Well, we also have experiments going back as far as William James, where we can carve off the mental component without the corresponding physical component of the action. In the James case, a patient's arm is anaesthetised, and it is held at his side in a dark room, and he is then ordered to raise it. He does what he thinks is obeying the order, but is later quite surprised to discover that his arm didn't go up. Now in that case, we carve off the mental component, that is to say the intention, from the bodily movement. For the man really did have the intention. That is, we can truly say of him, he genuinely did try to move his arm.

Normally these two components come together. We usually have both the intention and the bodily movement, but they are not independent. What our first two principles try to articulate is how they are related. The mental component as part of its conditions of satisfaction has to both *represent* and *cause* the physical component. Notice, incidentally, that we have a fairly extensive vocabulary, of 'trying', and 'succeeding', and 'failing', of 'intentional' and 'unintentional', of 'action' and 'movement', for describing the workings of these principles.

It becomes clear on this explanation that in the traditional legal definition of action, volition or 'act of will' takes the place of 'intentional causation'. But this does not mean the willed bodily movement model is the same as Searle's model. Volition is a more reductionist trigger of action than Searle's conception of 'intentionality'. The concept of 'intentional causation' is central to his argument and differs from legal and objectively based scientific explanations. He says that:

The kind of causation which is essential to both the structure of action and the explanation of action is intentional causation. ... What is special about intentional causation is that it is a case of a mental state making something else happen, and that something else is the very state of affairs represented by the mental state that causes it.

Searle's approach is useful in identifying what is left out of the willed bodily movement account. The major difference is that the willed bodily movement account does not require the coincidence of the mental representation and the state of affairs it causes. It simply requires a more reductionist psychological item, volition, to cause muscular contractions. What Searle describes as intentionality is a concept which becomes fragmented by incorporation into the framework of criminal responsibility - where it is split between three component parts: *actus reus*, *mens rea* and the voluntary act requirement.

This poses a dilemma for the criminal law. The problem does not stem from Searle's explanation of action but rather from the difficulty of imposing the structure of mens rea and actus reus elements, to differentiate levels of blameworthiness within the criminal law.¹⁵⁸ On the one hand the acceptance by the criminal law of Searle's explanation of action would be extremely difficult as within its notion of 'intentional causation' it includes separate mens rea states. Additionally the acceptance of such a definition of action would compromise the traditional distinction between actus reus and mens rea; particularly if the voluntary act requirement is seen as going to actus reus. On the other hand Searle gives a convincing answer to the question that Bratman raised regarding spontaneous action and provides a less reductionist and therefore more meaningful description of action. On Searle's explanation action occurs when an actor brings about something which matches his mental component. Therefore spontaneously catching a ball will have a matching mental component. It is an appropriate response.

Searle's fourth principle endorses this conclusion. In it he makes the distinction between '*prior intentions*' and '*intentions in action*, which are the intentions we have while we are actually performing an action.'¹⁵⁹ Herein lies one of the strengths of his explanation for the purposes of the criminal law. Searle suggests that explanations of action make a common mistake:

A common mistake in the theory of action is to suppose that all intentional actions are the result of some sort of deliberation, that they are the product of a chain of practical reasoning. But obviously, many things we do are not like that. We simply do something without any prior reflection. For example, in a normal conversation, one doesn't reflect on what one is going to say next, one just says it. In such cases, there is indeed an intention, but it is not an intention formed prior to the performance of the action. It is what I call an intention in action. In other cases, however, we do form prior intentions. We reflect on what we want and what is the best way to achieve it. This process of reflection (Aristotle called it 'practical reasoning'), characteristically results either in the formation of a prior intention, or, as Aristotle also pointed out, sometimes it results in the action itself.

He then goes on to consider in his fifth principle how '*prior intentions*' might operate. He

158 For a discussion of this see WILLIAMS, B. 1994

159 Emphasis in original

concludes that generally such intentions will be the result of 'practical reasoning'. He defines practical reasoning as 'how best to decide between conflicting desires.' How an action is described subjectively is by the selection of a 'preferred description'. The preferred description 'is determined by the intention in action.' Actions are therefore explained by reference to inner mental states. Searle's explanation of action is thus able to give a greater depth to explanations of action, by making reference to psychological states as causes of action. On his explanation: '[t]hose states relate to the action either by being steps in the practical reasoning that led to the intentions or the intentions themselves.' This contextual explanation of action is what makes our own actions understandable and influences our interpretations of other people's actions. Yet psychological explanations of behaviour are omitted from consideration of voluntariness if voluntary action is only comprised of willed bodily movement.¹⁶⁰

160 Searle's sixth, seventh and eighth principles are interrelated. His sixth principle states: 'The explanation of an action must have the same content as was in the person's head when he performed the action or when he reasoned toward his intention to perform the action.'

In his view this is what distinguishes action explanations from explanations of events in the natural world such as hurricanes. For natural events 'the content in the explanation only has to represent what happened and why it happened. It doesn't actually have to cause the event itself. But in explaining human behaviour, the cause and the explanation both have contents and the explanation only explains because it has the same content as the cause.'

Searle argues that such intentional causation does not occur 'out of the blue.' Characteristically it emerges as a result of 'practical reasoning.' This is a special form of reasoning 'that leads not to beliefs or conclusions of arguments, but to intentions and to actual behaviour. And when we understand this form of reasoning, we will have made a great step toward understanding the explanation of actions.' To understand such states, he argues that one must understand the setting within which they take place, which he calls 'the network of intentionality'.

This network of intentionality becomes a requirement of understanding action. Principle 7 states: '[a]ny intentional state only functions as part of a network of other intentional states. And by "functions" here, I mean that it only determines its conditions of satisfaction relative to a whole lot of other intentional states.' To explain what he means by a 'network of intentionality', Searle describes intention required for the process of driving from London to Oxford. This network may be spontaneous but the content of several interrelated mental states is required.

'I may have that quite spontaneously, but nonetheless I must still have a series of other intentional states. I must have a belief that I have a car and a belief that Oxford is within driving distance. Furthermore, I will characteristically have a desire that the roads won't be too crowded and a wish that the weather won't be too bad for driving. Also (and here it gets a little closer to the notion of the explanation of action) I will characteristically not just drive to Oxford, but drive to Oxford for some purpose. And if so, I will characteristically engage in practical reasoning — that form of reasoning that leads not to beliefs or conclusions of arguments, but to intentions and to actual behaviour. And when we understand this form of reasoning, we will have made a great step toward understanding the explanation of actions.'

(continued...)

Searle's account of what it is to act has a compelling authenticity but, as stated, it poses real problems for criminal law accounts of action which aim to split the story of a defendant's behaviour into various separate requirements of criminal responsibility. It must be acknowledged however that those requirements are increasingly out of step with reality, being based, as they are, on outdated philosophical and scientific notions of acting.

However, one of the problems with philosophical definitions is the difficulty of including terms such as 'intentionality', 'intention in action' and 'intentional causation' which differ significantly in their meaning from the criminal law's use of the term 'intention'. Incorporating philosophical notions of intentionality into the criminal law whilst at the same time retaining the current legal definitions of intention would cause potential confusion for jurors handling unfamiliar concepts. Added to this the social policy inspired normative requirements of the law increase the distortion between an act as a legal term of 'art' and the reality of 'acting'. Where Searle's account is of value is that it sets out clearly how an intuitive account of action might relate to both philosophical and scientific explanations of action. His argument is that it is not possible to know what causes an act without knowing the content of these mental representations. His explanation makes two problems very clear. Firstly the distinction between mental and physical is unhelpful.¹⁶¹ Secondly in his reliance on internal mental representations as being the cause of actions Searle, like Hornsby and Nagel, seems to view explanations of agency as opaque from an objective viewpoint. According to Searle unintentionality occurs either when the physical response to a mental representation cannot occur or when the neuronal activity in the brain stimulates movement without the normal mental representation that movement will occur. Unintentionality is measured in terms of either the mental ability to form a representation of the movement or the ability to turn the representation into action. It is the ability to monitor and control movement which is at issue.

160 (...continued)

Searle then introduces a further requirement for action and that is the existence of 'skills, habits, abilities, etc. against which intentional states function "the background of intentionality"'. This leads to the final principle. Principle 8: '[t]he whole network of intentionality only functions against a background of human capacities that are not themselves mental states.' So without the skills or capacities relevant to driving it would not be possible to choose to drive to Oxford at all

161 For a discussion of different types of action explanation and the problems of incorporating them into the criminal law see DUFF, R.A. 1996. *Criminal Attempts*. Oxford: Clarendon. Particularly chapter 11

In order for action to be involuntary this ability must be extinguished.

Summary

After considering some of the scientific and philosophical approaches to action what emerges is a slightly clearer picture of what action might be. Philosophical discussions of action tend to focus on questions such as: what is an action, how does this conception relate to mental causation or how should agency be defined? Philosophers and scientists differ in their approach to these questions. To some extent their judgements are coloured by their view of the mind/brain debate. If they see brain events as determining the outcome of actions they will utilise a narrower description of action than that outlined above.

Searle's construction of action may satisfy a need for a more common sense approach to what action is, and inform judgements as to what it is to be a human agent and to 'act'. Does such an exercise help to gain a clearer vision of the criminal law act requirement? Where Searle is particularly useful is in asserting that in the traditional views of action we are utilising the wrong map. His description of action is also useful in explaining when action is unintentional.

What emerges from this part of the philosophical debate is the need to make sure that in evaluations of criminal responsibility a full enough sense of human agency is encompassed, that the test of agency is not based upon ideas which are so reductionist that they render the meaningful evaluation of agency, by judge and jury, impossible. This leads to the second conclusion. The incorporation of the philosophy of action's concept of intentionality within criminal law descriptions of responsibility would be problematic for two reasons. The first is simply, as Hornsby points out, it does not mesh with existing culpability requirements and the second is pragmatic, the criminal law has sufficient problems in making explicit the concept of intention as a mens rea requirement, the inclusion of a requirement of intentionality in the requirement that an act be voluntary might confuse juries and would compromise the separate mens rea definitions of blameworthiness.

Additionally the alternative concept of mental causation which emerges from the philosophical

debate and the doubts it raises about the value of a scientific view of mental causes are relevant to the construction of a framework of criminal responsibility. Scientifically, it seems relatively uncontentious that the commencement of action is subconscious. Explanations of how consciousness occurs and how conscious mental events cause action to take place are far more debatable. Greenfield puts forward a credible neuroscientific explanation of how conscious experience may vary in intensity. Libet, provides evidence that the ability to control action may only enter conscious appreciation immediately prior to action taking place, but in sufficient time for action to be aborted. Medically there is evidence that Lord Denning's definition of unconscious states must include states of partial consciousness. Neither concussion nor sleepwalking appear to be states where the defendant is totally unconscious. In assessing whether movements made by the partially conscious are culpable, the willed bodily movement model encounters difficulties because of the reductionist nature of the evaluations that it permits. It is not whether a defendant was conscious that should be relevant but whether she is sufficiently conscious to be able to monitor and control movement.

Chapter 5

In this chapter certain questions remain to be addressed regarding the definition of involuntary action within the criminal law. Not the least of these is how notions of involuntary action relate to the requirements of criminal responsibility. One of the first aims of this chapter is to discuss the meaning normally attributed to free will within the criminal law and to examine how this interacts with the more determinist notions of causation exemplified by medical and scientific explanations of behaviour. If voluntariness is fundamental to liability within the criminal law, as it seems to be, then a key factor in criminal responsibility is removed, once involuntariness is proved. In the last chapter it was suggested that this key element should be the capacity to control movement. This description of involuntariness in relation to movement will be discussed later.¹

Action and Blameworthiness

English law requires a voluntary act before criminal liability may be imposed. However, the criminal law definitions of responsibility are seen as needing to encompass both act and omission, in order for culpable omissions to be blameworthy. Fletcher suggests that the whole argument is redundant in terms of the definition of involuntary action: '[i]n the case of commission by omission, the problem is statutory interpretation and the danger implicit in extending the verb "killing" to encompass "letting die."' ² The second problem for the law lies in the idea of punishing people for failures to act. Clearly, the capacity to monitor movement, the test proposed in the last chapter, is fundamental to acts of omission as well as acts of commission. If a defendant cannot control the outcome of her action then she cannot be responsible for what she is unable to do. Fletcher also makes this point:

The act requirement speaks to the critical importance of human agency in our theory of

¹ Legal commentators continue to discuss the philosophical underpinnings of action descriptions see SIMESTER, A.P. 1998; SHAPIRA, R. 1998; ZAILBERT, L. A. 1998; ROBINSON, P. 1997. *Structure and Function in the Criminal Law*. Oxford: Clarendon; DUFF, R.A. 1996; MOORE, M. 1993. and 1997; CORRADO, M. 1990. Automatism and the Theory of Action. (1990) 39 *Emory LJ* 1191-1228. See also the discussion following the publication of MOORE, M. 1993. in (1994) 142 *UPLR*

² FLETCHER, G.P. 1994. p.1447

moral and legal responsibility. But whatever the act/omission distinction is about, it is not about the problem of human agency. Agency is built into the standard example of the bystander who lets the child drown. The example would not even be interesting unless we assumed that the bystander chose to remain motionless and that she had an unrestrained option to intervene and rescue the child.³

In defining the voluntary act requirement the philosophy of action is useful and informative but not definitive because of the impossibility of definitely resolving the metaphysical discussion of action as a concept. Thus, whilst the arguments that theorists may make about basic actions are of interest and may highlight the distinction which it is necessary to make between loss of self control and loss of a capacity to control, being based as they are on metaphysical notions of what it means to act they are informative rather than determinative. However, the law needs to be aware of the current debate regarding voluntariness and consciousness both in terms of philosophy and neuroscience,⁴ particularly where the two disciplines intersect. It will not be helpful, in evaluating modern scientific or medical statements regarding involuntariness, to continue to use outdated descriptions of action. It is possible to remain sceptical about the mind/body debate and avoid much of the controversy, but at the same time acknowledge that the discussion of the problem has moved forward.⁵ It seems that this would be the most

3 FLETCHER, G.P. 1994. p.1444

4 For a discussion of this see *Journal of Consciousness Studies*. 1999, vol. 6, no. 8-9: INGVAR, D.H. 1999. On Volition: a neurophysiologically oriented essay. 1-10; SPENCE, S.A. & FRITH, C.D. 1999. Towards a Functional Anatomy of Volition. 10-29; SCHULTZ, W. 1999. The Primate Basal Ganglia and the Voluntary Control of Behaviour. 31-45; LIBET, B. 1999; GOMEZ, G. 1999. Volition and the Readiness Potential. 59-76; CLAXTON, G. 1999. Whodunnit? Unpicking the 'seams of free will'. 99-113; SCHWARZ, J.M. 1999. A Role for Volition and Attention in the Generation of New Brain Circuitry: Towards a neurobiology of mental force. 115-42; STAPP, H.P. 1999. Attention, Intention and Will in Quantum Physics. 143-64; MOHRHOFF, U. 1999. The Physics of Interactionism. 165-84; WILSON, D.L. 1999. Mind-Brain Interaction and Violation of Physical Laws. 185-200; HODGSON, D. 1999. Hume's Mistake. 201-24; LOWE, E.J. 1999. Self, Agency and Mental Causation. 225-39; McCRONE, J. 1999. A Bifold Model of Freewill. 241-59; LANIER, J. 1999. And Now a Brief Word From Now: Logical Dependencies Between Vernacular Concepts of Free Will, Time and Consciousness. 261-8; BLAUVELT, W. 1999. Y's Domain. 269-74; FREEMAN, A. 1999. Decisive Action: Personal Responsibility All the Way Down. 275-8; CLARKE, T.W. 1999. Fear of Mechanism: A Compatibilist Critique of 'The Volitional Brain'. 279-93. See also BURNS, J.E. 1999. Volition and Physical Laws *Journal of Consciousness Studies*. 1999, vol. 6, no. 10, 27-47 and see *Journal of Consciousness Studies*. 2000. vol. 7, no. 10: SEARLE, J.R. 2000. Consciousness, Free Action and the Brain. 3-22; GALLESE V. 2000. The Inner Sense of Action: Agency and Motor Representations. 23-40; FREEMAN, A. 2000. Responsibility Without Choice: A First-Person Approach. 61-7

5 'In recent years, a certain conception of consciousness and its relation to the brain has been emerging in philosophy, cognitive science and neuroscience and is becoming more commonly accepted in
(continued...)

appropriate way for the criminal law to proceed.

Involuntary action, free will and criminal responsibility.

The legal requirement for a voluntary act encompasses the minimal ingredients required for the imposition of criminal liability. The reason why a claim of involuntariness is felt to be fundamental is because of its ability to excuse criminal liability despite the fact that wrongdoing has occurred. In cases where claims of involuntariness are accepted an important line is being drawn between criminal responsibility and acquittal. Involuntariness in this sense may take a number of forms. It could be that what otherwise would be a crime occurs without any real action by the defendant. Examples of this sort include cases where someone else takes hold of an actor's arm and uses it to inflict harm on a third party, or alternatively where a car's brakes fail and this leads the driver of the car to have a fatal accident.

Alternatively it may be that there is some malfunction of the body which causes a fit or spasm and there is no authorship in any meaningful sense of the act, an example of this is the 'dental patient who kicks out while coming round from an anaesthetic'⁶. In *Ross v HM Advocate*,⁷ Lord Brand describes automatism as similar to the defence of accident and it seems in cases of this type that this is true. The more problematic defendant for the law is the individual who carries out what would be the actus reus of a crime whilst in a confused or semi conscious state. An example of this type of potential defendant is the epileptic who killed her baby by putting her in a microwave during an epileptic attack. The newspaper report states that:

Suddenly struck by the [epileptic] attack ... she put the six week old child in the oven instead of the milk. ... Dutch epilepsy expert Dr. Gerald Brekelmans said: 'During an

5 (...continued)

those disciplines. It is profoundly opposed to both materialism and dualism as these have traditionally been conceived. It rejects those forms of materialism that attempt to reduce consciousness to behaviour, computer programs, or functional states of a system, but at the same time - while granting the reality and irreducibility of consciousness - it also rejects dualism in the sense in which dualism claims that mental states are not ordinary parts of the physical world.'

SEARLE, J. 2000, p.3

6 *R v Quick* [1973] 3 WLR 26, 31

7 1991 SLT 564, 578

attack, patients do bizarre things and don't remember anything later.'⁸

This suggests that the mother was unable to recall any of the details of the attack. There are a variety of ways in which the prosecution authorities in England and Wales might approach this type of case.⁹

The question of where the line between criminal responsibility and acquittal should fall is a difficult one and this thesis in examining automatism considers the most problematic case. Cases where automatism is claimed are frequently emotive, and medical practitioners and scientists may well express differing opinions. Differences of opinion as to the credibility of claims of incapacity have existed throughout the history of mental condition defences. Bastarache J. in *Stone* said that 'automatism is easily feigned'.¹⁰ A similar argument could be made in respect of the claim of self defence where the defendant might be the only witness to the events which might incur criminal liability. In *Stone* the other explanation put forward for the defendant's behaviour was that his wife had provoked his violent attack, which led to her subsequent death. However, Bastarache J., confined his criticisms with regard to feignability to the automatism defence though the same facts had given rise to both claims and *Stone* was the only witness to his wife's death. Similar comments concerning the defence have been expressed in British courts. Comments such as those made in *Stone* or by Lord Denning in *Bratty* that 'blackout is one of the first refuges of the guilty conscience and a popular excuse'¹¹ might suggest an approach to the defence of automatism which is not entirely open minded.¹²

8 *Daily Mail* 12.9.2000 p.17. The incident took place in Holland

9 The most plausible explanation of her behaviour is that given by Dr. Breckelmans that is, because of her epilepsy, she did something 'bizarre'. Therefore any claim to a defence in English law, assuming that the prosecution could prove mens rea in respect of the crime with which she was charged, would seem to be based on her epilepsy, which could only found a defence of insanity as non-insane automatism would not be an available defence following *R v Sullivan* [1983] 2 All ER 673

10 (1999) 134 CCC (3d) 353, 425

11 *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 414 quoting Stabile J. in *Cooper v McKenna, ex parte Cooper* [1960] Qd LR 406, 419

12 Therefore it would seem an appellant whose case or appeal had been the subject of comments of this type from the judge might well have a right of appeal based on article 6 of The European Convention on Human Rights and Fundamental Freedoms. The European Court of Human Rights case law protects the defendant from bias through the interpretation of the right to a fair trial. The courts in England
(continued...)

However, it is not disputed that, judges have to walk the tightrope between the demands of society for retribution, the protection of society from those who may be dangerous, and the fair imposition of criminal responsibility. But it is argued that there is a need for discussion of the principles that underlie their decisions to see whether a more rational approach to questions of voluntariness/involuntariness is possible. Though the difficulties are evident it is possible that the courts could be less restrictive in their views as to what constitutes non-insane automatism. In the case of the epileptic who cooked her baby is the imposition of criminal liability really appropriate? Is it really appropriate in such cases that, if automatism were to be claimed, the only verdict available should be an acquittal on the basis of insanity? It could be argued that this sort of case would never come to trial. But in a sense that argument avoids the real issue. Should the police, or the Crown Prosecution Service, be the arbiters of how such cases are handled? Should the only means of avoiding a not guilty by reason of insanity verdict in such cases be prosecutorial discretion? If the facts are altered slightly the pressure to prosecute may become greater. Suppose that the woman was a nurse or a childminder and that there were a number of babies and bottles involved. Should those whose babies were killed have an opportunity to hear the case argued in court?

Perhaps these are some of the toughest questions any judge or jury might have to face. What sort of definition of action and involuntariness would assist a jury in such a case? How does the law view free will in these circumstances? The criminal law views choice in relation to action in a more limited sense than that which is envisaged by a normal use of the word. This is because of the view the law takes of compulsion.¹³ An example of the view adopted by the criminal law to responsibility for choices made, is in its treatment of choices made by a

12 (...continued)

and Wales must when considering the Convention take into account European Court of Human Rights decisions when determining a question which has arisen in connection with a Convention right Human Rights Act 1998 s 2. A defendant's right to a fair trial may be compromised when the judge could have formed an opinion of the defendant's case prior to its being heard. 'Whether these misgivings should be treated as objectively justified depends on the circumstances of each particular case' *Bulut v Austria* (1997) 24 EHHR 84 para 33. For a discussion of the issues raised by a claim of bias under Article 6 and an interpretation of European Court of Human Rights case law relating to such a claim see CATLEY, P. & CLAYDON, L. 2000. Pinochet, Bias and the European Convention on Human Rights. in WOODHOUSE, D. (Ed.). 2000. *The Pinochet Case*. Oxford: Hart.

13 For a discussion of the approach taken by the criminal law to duress, coercion and necessity see SMITH, J.C. 1999. p.231-52

defendant who claims the defence of duress. For the purposes of criminal liability, it is only acceptable to claim the defence of duress in limited circumstances. What the court is evaluating is the blameworthiness of a defendant's choice. A court never assumes that a defendant's free will is totally unfettered.

Free will and blameworthiness.

One of the problems for the criminal law in constructing liability is that the concept of blaming depends to some degree on notions of free will. Much discussion has taken place regarding the necessity or otherwise of free will in constructions of moral culpability and of criminal responsibility. Here it is necessary to note those discussions¹⁴ and to state that there is insufficient space to examine all the arguments which surround the notion of free will.

Notions of blameworthiness are frequently connected to ideas of deserved punishment. Boldt writes that:

All human behaviour can be understood from two perspectives. The first, which can be thought of as objective in nature, holds that conduct is always the product of some matrix of causal factors that necessarily determines choice. The second ... regards the great bulk of human activity as having been produced through the agency of an agent's free will. It is this second perspective that is generally given voice in the criminal law.¹⁵

Boldt concludes that in its acceptance of the second perspective the criminal law adopts a compatibilist stance:

a key element in this construction of individual responsibility and a key feature of

14 ALLEN, F.A. 1977. Criminal Law and The Modern Consciousness: Some Observations on Blameworthiness. (1977) 44(3) *Tennessee LR* 735-63; ARENELLA, P. 1992. Convicting the Morally Blameless. Reassessing the Relationship between Legal and Moral Accountability. (1992) 39 *UCLA LR* 1511-1662; DUFF, R.A. 1996. particularly Part II. HART, H.L.A. 1967. *Varieties of Responsibility*. (1967) 83 *LQR* 346-64; KENNY, A.J.P. 1978. *Freewill and Responsibility*. London: Routledge & Kegan Paul; PILSBURY, S.H. 1992. The meaning of Deserved Punishment: An Essay on Choice, Character and Responsibility. (1992) 67 *Indiana LJ* 719-52

15 BOLDT, R.C. 1992. The Construction of Responsibility in the Criminal Law. (1992) 140 *UPLR* 2245-87, p.2246

excuse theory generally is the criminal law's rather stylized treatment of the human capacity for reasoning. As a theoretical matter, it is fair to assert that the process of practical reasoning, through which alternative courses of conduct are weighed and decisions reached, is itself in every instance fully determined by factors beyond the autonomous control of the actor. At the same time, conduct which results from this sort of cognitive work does seem to belong to the human actor. It is in this respect that conduct can be simultaneously described as determined and free.¹⁶

The compatibilist stance may be contrasted with hard determinism. Littman describes hard determinism as a belief that 'freedom and determinism cannot co-exist.'¹⁷ The effect of this stance when applied to the criminal law is to view 'the environment rather than genetics as a cause of behaviour.' In contrast with soft determinism (compatibilism) Littman suggests that hard determinists do not see behaviour as 'free in a determined world'. They believe 'ultimately our desires and choices are caused by factors outside of our control.'¹⁸

Compatibilists argue that 'determinism is indispensable to free action'.¹⁹ Thus cause is essential to action, and actions may be brought about in a number of ways:

My doing something thus consists of a certain event taking place because I want it to. This view requires that there be some connection between my wanting to perform the action and its occurrence. The obvious connection suggested to the compatibilist, is a causal one. The wanting causally produces the doing. If this view or any variation of it is correct, then my doing something requires its being caused by some psychological state within me. Consequently, action and therefore free action must be compatible with causal determination since it involves causal determination as a constituent.²⁰

However where compatibilism differs from hard determinism is in its view as to what causes are relevant to action and within action descriptions compatibilism accepts the relevance of psychological states as causes. Reasons, beliefs and desires on this view become relevant to

16 BOLDT, R.C. 1992. p.2248

17 LITTMAN, R.J. 1997. Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will. (1997) 60 *Albany Law Review*, 1127-70 p.1137

18 LITTMAN, R.J. 1997. p.1137

19 CORNMAN, J.W. & LEHRER, K. 1968. *Philosophical Problems and Arguments*. New York: MacMillan p.171

20 CORNMAN, J.W. & LEHRER, K. 1968. p.172

agent responsibility. Compatibilism or soft determinism works by adapting the determinist thesis to allow evaluations of behaviour other than those which are purely physical causes.

Another category identified by Littman is a belief in free will or indeterminism. Littman distinguishes indeterminists from soft determinists because indeterminists 'believe there is no way to predict how a particular person will act in a given situation, due to the indeterminate character of nature itself.'²¹ A distinction is made between indeterminists and soft determinists:

Indeterminism does not focus so much on whether the act was freely chosen but whether the individual had the freedom to make the choice. Indeterminism holds that to be '*truly responsible* for one's actions,' one must be a free agent. The agent must be both undetermined by external causal factors and self-determined. The self-determined quality of a free agent is premised on the concept that 'the process of deliberation (however perfunctory or inexplicit) that leads us to make whatever choice we do finally make is truly *our* deliberation.' The ability to recognize and consider available choices is thus a prime element of the free will theory.²²

The problem with the acceptance of any definition as compromising watertight characteristics is that it tends to obscure the subtleties of argument which may cross the borders of the distinctions between say compatibilism and indeterminism. But the point of relevance to the understanding of the basis on which the criminal law predicates blame is that both indeterminism and compatibilism hold that someone may be held responsible for the choices which they make. This point is well made by Honderich:

Both sides agree in assigning to all of us a certain belief, which they take to be a plain truth. It is the factual belief that something is necessary for something else. A free choice is necessary for holding the person responsible. The sides differ ... about what we are all supposed to take a free choice to be.²³

21 LITTMAN, R.J. 1997. 1127-1170 p.1131. Theories of human nature based upon chaos theory are of relevance here. For a discussion of these theories see HODGSON, D. 1991. *The Mind Matters*. Oxford: Clarendon ; PENROSE, R. 1989. *The Emperor's New Mind*. Oxford University Press; PENROSE, R. 1994; NUNN, C. 1996, particularly chapter 4

22 LITTMAN, R.J. 1997. p.1131-2. Quoting from STRAWSON, G. 1986. *Freedom and Belief*. Oxford: Clarendon. p.47

23 HONDERICH, T. 1993. *How Free Are You?* Oxford University Press. p.100 though confusingly he refers to Indeterminism as incompatibilism, whereas Littman refers to hard determinism as incompatibilism

This debate clearly underlies the discussion of what it means to be free and to act but is complex. Determinist theories do not support the idea of retributive justice,²⁴ whereas the criminal justice system is based in part on retributive justice. Also the restriction of explanations of human behaviour to purely mechanistic causes poses problems in evaluating the culpability of an individual's behaviour.

Searle and the explanation of free will, and voluntariness

Searle poses the possibility that the whole argument has taken the wrong direction. He suggests that what is relevant in terms of voluntary action, responsibility and freedom of action are the reasons a person has for acting. In his view at the basis of voluntary action is an irreducible self. This self acts voluntarily in three 'gaps' which Searle identifies in the explanation of action.

First, there is a gap between the reflection on the reasons for an action and the decision or the formulation of the prior intention to perform that action; second there is the gap between the formation of the prior intention, and the actual initiation of the action in the form of an intention in action; and third, there is a gap in the case of any action extended through time.²⁵

Searle sees the explanation of voluntary action and free will as existing within these 'gaps'. According to Searle it is in the relationship between the gaps, causation and consciousness that the explanation of free action may be found. In his opinion the key to understanding voluntary action lies in the role which reasons play in relation to causally sufficient conditions for action. Searle writes:

I want to characterize the relationship between the gaps, causation, and consciousness, more precisely. In the most general form, we can say that in the case of conscious voluntary actions, the psychological antecedents of the action are not perceived as causally sufficient for the performance of the action. In conscious decision making and acting, my reasons for the action do indeed function causally in the production of the

24 HONDERICH, T. 1993. Chapter 10

25 SEARLE, J. 2000. p.7

decision, and the decision does function causally in the production of the action, but in neither case am I aware of either the reasons for the action producing the decision, or the decision producing the action by causally sufficient conditions. That is, the antecedents function causally, but they do not function by way of causally sufficient conditions. This is a crucial point for any discussion of free will.²⁶

Searle acknowledges the argument made by Nagel and others that his explanation might give rise to the argument that on this view of action the determinants of action are too random and therefore do not explain 'why that action was performed as opposed to some other action which could have been performed consistently with all of the psychological causes.'²⁷ Searle suggests that to pose this argument is to misunderstand the 'nature of rational explanations of human action.' This misunderstanding rests on the distinction between 'the explanation of human action by citing reasons and other causal explanations.' The explanation of human action lies not in the investigation of the causally sufficient condition for action but in the reasons for acting of an irreducible self.²⁸

In such explanations the notion of a self is ineliminable and irreducible. Actions are complex events consisting of intentions in action (roughly speaking, tryings) plus their conditions of satisfaction (typically bodily movements). So you can reduce actions to events, but you can't reduce or eliminate the notion of the self, and you cannot eliminate the concept the self acting on a reason from this form of explanation.²⁹

26 SEARLE, J. 2000. p.7

27 SEARLE, J. 2000. p.8

28 SEARLE, J. 2000. p.8 Searle is reluctant to postulate such an irreducible self but feels that such a self lies at the root of action explanations

29 Searle's justification for this reasoning needs to be cited in full. He ties the irreducible self to causally sufficient conditions as follows:

'To develop, however briefly, the argument for this conclusion, let's go through some of the features that explanations of rational behaviour have. As always in such cases we must proceed from the first-person point of view. ... Suppose that I voted for Clinton in the 1992 election and I did so on the basis of a specific reason, I thought he would be better for the economy. Now let us ask the following questions.

1. Did my reason function causally in the production of my action?
Answer: yes.

2. Did it function by setting causally sufficient conditions?

(continued...)

If this explanation of voluntariness is correct then clearly there is going to be an irreconcilable difficulty in explaining a person's behaviour in terms of either a Humean or a scientific approach to voluntariness when what is being sought is a rational account of the reasons behind someone's action. Put more simply the difficulty arises in trying to extract from scientific explanations of behaviour the reasons why someone acted.

The problem of mechanistic explanations of human behaviour and culpability.

In the Introduction, consideration was given to the suggestion that the work of scientists such as Crick and Blakemore posed problems for determinations of criminal responsibility. As has been discussed the acceptance of this argument depends upon the belief that only certain, scientifically observed, causes of action count in the evaluation of criminal liability. This assertion may be refuted by giving consideration to what these action explanations offer to determinations of criminal responsibility.

29 (...continued)

No. For given the reason, I still might have decided otherwise. I might have done something different.

3. Is the explanation adequate as it stands?

Absolutely. I had a lot of reasons pro and con, but I voted for Clinton for that reason, and *I made that reason effective by acting on it*. Citing the reason is a perfectly adequate explanation of my action.

4. Is there an element of chance or randomness in any such explanation?

Not at all. It is a traditional mistake to suppose that where you do not have causal sufficiency, you have randomness. That is definitely not the case where rational conscious action is concerned, because in rational conscious action the agent acts on a reason, not at random, even though the agent's behaviour is not fixed by causally sufficient antecedent conditions.

5. Is consciousness essential to this process? Answer: yes. We are talking about conscious processes. The problem of freedom of the will is essentially a problem about a certain aspect of consciousness, namely that form of consciousness that manifests the gaps of the sort that I have been discussing.

There is no question that rational explanations of human behaviour, that is, explanations that cite the reasons the person acted on, are both non deterministic in form and at the same time completely adequate as explanations. How is that possible? I believe that the existence of the gap, and the adequacy of non deterministic explanations presupposing the gap, require us to postulate an irreducible, non-Humean self. We can only make sense of this form of explanation if we suppose that in rational decision making there is something more than a Humean bundle of perceptions.'

SEARLE, J. 2000. p.8-9. Emphasis in the original

A scientific explanation of human behaviour leads Blakemore to suggest that the present system of criminal justice is not sustainable. But his argument is predicated on the most suitable disposal of those who have committed wrongful acts and the genetic inheritance of defendants rather than issues of culpability. He accepts that science and the law make decisions regarding individuals' behaviour by differing means:

The problem comes when we try to mix the judicial system with medical science and expect them to use the same language. The courts are concerned with questions of both action and guilt. But science has no simple place for right and wrong; it seeks causal explanations for events. No one would try to assign *responsibility* for the fact that the earth orbits the sun. Nor is it the job of science to decide whether people are responsible for actions that society judges to be wrong.³⁰

Blakemore seems to be stating that scientific explanations of events cannot be determinative of responsibility. Morse also makes this point. On this basis reductionist scientific explanations of movement are not useful when trying to ascribe responsibility. The whole of Morse's explanation is included here because it underlines the relevance of making a distinction between medical/scientific and legal explanations of behaviour in relation to the imposition of responsibility. His argument is expressed in a slightly different manner to Blakemore's. What Morse is discussing is how medical or scientific notions of behaviour should be utilised by the courts in addressing issues of responsibility. He points to the different approaches taken by law and medicine to explanations of behaviour:

When one asks about human action, 'Why did she do that?,' two distinct types of answers may be given. The reason-giving explanation accounts for human behavior as a product of intentions that arise from the desires and beliefs of the agent. The second type of explanation treats human behavior as simply one bit of the phenomena of the universe, subject to the same natural, physical laws that explain all phenomena. Suppose, for example, we wish to explain why Molly became a lawyer. The reason-giving explanation might be that she wishes to emulate her admired mother, a prominent lawyer, and Molly believes that the best way to do so is also to become a lawyer. If we want to account for why Molly chose one law school rather than another, a perfectly satisfactory explanation under the circumstances would be that Molly chose the best school that admitted her.

30 BLAKEMORE, C.J. 1988. p.270. Emphasis in original

The mechanistic type of explanation would approach these questions quite differently. For example, those who believe that mind can ultimately be reduced to the biophysical workings of the brain and nervous system—the eliminative materialists—also believe that Molly's 'decision' is *solely* the law-governed product of biophysical causes. Her desires, beliefs, intentions, and choices are therefore simply epiphenomenal, rather than genuine causes of her behavior. According to this mode of explanation, Molly's 'choices' to go to law school and to become a lawyer (and all other human behavior) are causally indistinguishable from any other phenomena in the universe, including the movements of molecules and bacteria.

As clinical and experimental sciences of behavior, psychiatry and psychology are uncomfortably wedged between the reason-giving and mechanistic accounts of human conduct. Sometimes they treat actions as purely physical phenomena, sometimes as texts to be interpreted, and sometimes as a combination of the two. Even neuropsychiatry and neuropsychology, the more physical branches of their parent disciplines, are similarly wedged because they begin their investigations with *action* and not simply with abnormal movements. One can attempt to assimilate reason-giving to mechanistic explanation by claiming that desires, beliefs, and intentions are genuine causes, and not simply rationalizations of behavior. Indeed, folk psychology, the dominant explanatory mode in the social sciences, proceeds on the assumption that reasons for action are genuinely causal. But the assimilationist position is philosophically controversial, a controversy that will not be solved until the mind-body problem is 'solved' - an event unlikely to occur in the foreseeable future.

Law, unlike mechanistic explanation or the conflicted stance of psychiatry and psychology, views human action as almost entirely reason-governed. The law's concept of a person is a practical reasoning, rule-following being, most of whose legally relevant movements must be understood in terms of beliefs, desires, and intentions. As a system of rules to guide and govern *human* interaction—legislatures and courts do not decide what rules infrahuman species must follow—the law presupposes that people use legal rules as premises in the practical syllogisms that guide much human action. No 'instinct' governs how fast a person drives on the open highway. But among the various explanatory variables, the posted speed limit and the belief in the probability of paying the consequences for exceeding it surely play a large role in the driver's choice of speed. For the law, then, a person is a practical reasoner, a being whose action may be guided by reasons. The legal view of the person is not that all people always reason and behave consistently rationally according to some preordained, normative notion of rationality. It is simply that people are creatures who act for and consistently with their reasons for action and are generally capable of minimal rationality according to mostly conventional, socially constructed standards.

On occasion, the law appears concerned with a mechanistic causal account of conduct. For example, claims of legal insanity are usually supported and explained by using mental disorder as a variable that at least in part caused the defendant's offense. Even in such cases, however, the search for a causal account is triggered by the untoward, crazy *reasons* that motivated the defendant. Furthermore, the criteria for legal insanity

primarily address the defendant's reasoning, rather than mechanistic causes. For example, in addition to a finding of mental disorder, acquittal by reason of insanity requires that the defendant did not know right from wrong or was unable to appreciate the wrongfulness of her act. Conduct motivated by crazy reasons is intentional human action. The law excuses a legally insane defendant, however, because her practical reasoning was non-culpably irrational, not because her behavior was caused by abnormal psychological or biological variables. Indeed, it is a simple matter to devise irrationality criteria for legal insanity that would excuse all people now found legally insane, but which make no mention whatsoever of mental disorder or other alleged mechanistic causes.³¹

This is a long passage but it makes it clear how the law views explanations of behaviour and how it utilises explanations of human behaviour to establish criminal responsibility. Blakemore on the other hand sees constructions of responsibility as based upon morality, an area in which he admits, scientific explanations have no particular claim to be preferred to other explanations. Nonetheless he feels that scientific explanations of the world do have a place in determining the best disposal options for those who commit wrongdoing.³²

Issues of responsibility may therefore become complicated by scientific explanations which do not have the same focus as the criminal law. The criminal law focusses, *inter alia*, on blameworthiness, whereas medical and scientific explanations focus largely on mechanistic causes and the most appropriate treatment for the identified medical cause of the problem. To underline this argument consider Blakemore's view that human beings respond to their environment because of genetic inheritance:

All our actions are products of the activity of our brains. It seems to me to make no sense (in scientific terms) to try to distinguish sharply between acts that result from conscious intention and those that are pure reflexes or that are caused by disease or damage to the brain. We *feel* ourselves, usually, to be in control of our actions, but that feeling is itself a product of the brain, whose machinery has been designed, on the basis of its functional utility, by means of natural selection.³³

31 MORSE, S.J. 1996. *Brain and Blame*. 1996. 528-9. Emphasis in original. Morse is describing the American view of the insanity defence

32 BLAKEMORE, C.J. 1988. p.270

33 BLAKEMORE, C.J. 1988. p.270

This argument is clearly relevant to theories about the genetic causes of crime. Crime on this view becomes a matter of 'natural selection' and presumably the manner of dealing with it becomes treatment and not punishment. Both Blakemore and Morse seem to be suggesting that there is a problem with relying on scientific explanations of behaviour in assessing responsibility. If Blakemore's view of causation is accepted then the legal conception of responsibility disappears.

Morse makes this point most effectively:

All phenomena in the universe are presumably caused by the necessary and sufficient conditions that produce them. If causation were an excuse, no one would be responsible for any conduct, and society would not be concerned with moral and legal responsibility and excuse.³⁴

On this view the genetic determinants of behaviour are not relevant to criminal responsibility. Scientific explanations simply form one explanation of human behaviour and in legal decision making they should not be preferred over other explanations of behaviour.

Fault and criminal responsibility.

If scientific descriptions of action do not mesh with the requirements of criminal responsibility how do the philosophical descriptions which were given to voluntary action in the last chapter relate to the criminal law? Hornsby's description of action might be compared with that of a focussed control requirement. Fischer and Ravizza refer to this type of control as guidance control. They argue that this type of control 'should be understood in terms of two elements: the agent's "ownership" of the mechanism that actually issues in the relevant behaviour, and the reason responsiveness of that mechanism.' This is seen by them as an essential element of moral responsibility: 'an agent is morally responsible for an action, on our account, to the extent that this action issues from the agent's own, reasons-responsive mechanism.'³⁵

34 MORSE, S.J. 1996. p.532

35 FISCHER, J.M. & RAVIZZA, M. 1998. p.241. Both quotations

Hart referred to this type of legal liability as capacity responsibility.³⁶ This type of responsibility was 'the most important criterion of moral liability - responsibility'.³⁷ Implicit in Hart's argument regarding the importance of capacity responsibility is the idea that in order to be just the law must treat a defendant as an autonomous agent. Gardner points out that the idea of agency which emerges from this discussion may be seen as a limited one. He argues that capacity in this sense is a condition of moral responsibility which in turn is a condition of moral agency.³⁸

Ashworth describes the approach taken to individual autonomy by the criminal law as having important normative elements; and being based upon Hart's conception of capacity responsibility:

No less important a part of the principle of autonomy are its normative elements: that individuals should be respected and treated as agents capable of choosing their acts and omissions, and that without allowing independence of action to individuals they could hardly be regarded as moral persons. Some such principles lie at the centre of most liberal political theory, and can be found, for example, in Ronald Dworkin's principle that each individual is entitled to equal concern and respect. The principle of autonomy assigns great importance to liberty and individual rights in any discussion of what the state ought to do in a given situation. Indeed, a major part of its thrust is that individuals should be protected from official censure, through the criminal law, unless they can be shown to have chosen the conduct for which they are being held liable. ... H. L. A. Hart's famous principle, that an individual should not be held criminally liable unless he had the capacity and a fair opportunity to do otherwise, is also grounded in the primary importance of individual autonomy.³⁹

Whilst accepting to a certain extent the concept of individual autonomy the courts have limited

36 HART, H.L.A. 1967. Hart identified four main types of responsibility: role responsibility, causal responsibility, liability responsibility and capacity responsibility. HART, H.L.A. 1967. p.346

37 HART, H.L.A. 1967. p.360

38 See GARDNER, J. 1998. On the General Part of the Criminal Law. *in* DUFF, R. A. (Ed.). 1998. See also BAKER, M. 1992. Theorizing About Responsibility and Criminal Liability. (1992) 11 *Law & Philosophy* 403-30

39 ASHWORTH, A. 1999a. p.28. For a discussion of the approach adopted by Hart see SMITH K.J.M. & WILSON, W. 1993. Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses - The English Judicial Response. (1993) 13 *OJLS* 69-98

its application by the application of the concept of prior fault.⁴⁰ In terms of automatism, in *Quick*, Lawton L.J. saw the question of prior fault as of great importance:

In this case Quick's alleged mental condition, if it ever existed, was not caused by his diabetes but by his use of the insulin prescribed by his doctor. Such malfunctioning of his mind as there was, was caused by an external factor and not by a bodily disorder in the nature of a disease which disturbed the working of his mind. It follows in our judgment that Quick was entitled to have his defence of automatism left to the jury and that Bridge J.'s ruling as to the effect of the medical evidence called by him was wrong. Had the defence of automatism been left to the jury, a number of questions in fact would have had to be answered.

These questions are clearly fault related. Firstly Lawton L.J. asked 'If he was in a confused mental condition, was it due to a hypoglycaemic episode or to too much alcohol?' Lawton L.J. then asks a series of questions which seem to be directly related to the defendant's culpability '[i]f the former [the hypoglycaemic episode], to what extent had he brought about his condition by not following his doctor's instructions about taking regular meals? Did he know that he was getting into a hypoglycaemic episode? If yes, why did he not use the antidote of eating a lump of sugar as he had been advised to?'⁴¹ Culpability was in Lawton L.J.'s view determinative of the issue as to whether Quick's defence should succeed.

On the evidence which was before the jury Quick might have had difficulty in answering these questions in a manner which would have relieved him of responsibility for his acts. We cannot say, however, with the requisite degree of confidence, that the jury would have convicted him. It follows that his conviction must be quashed on the ground that the verdict was unsatisfactory.⁴²

In *Quick*, the Court of Appeal considered *R v Lipman*⁴³ and concluded that the policy restrictions placed on defences based on claims of negation of mens rea because of the consumption of too much alcohol should also apply to the failure to take sufficient insulin.

40 See *DPP v Majewski* [1977] AC 443

41 [1973] 3 WLR 26, 35-6. All quotations

42 [1973] 3 WLR 26, 36

43 [1969] 3 All ER 410

Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self-induced incapacity will not excuse ... nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin.⁴⁴

Mackay examines the requirement of prior fault, and concludes that social policy in respect of intoxicated defendants has affected the application of the prior fault doctrine with respect to defendants who claim a mental condition defence. 'The rule relating to self - induced intoxication is undeniably strict and is the result of policy factors. Thus in *Majewski* it was made clear that an intoxicated offender could be convicted of a basic intent offence even if his condition was akin to automatism.'⁴⁵ This policy restriction raises problems for defendants who claim automatism when it is not clear whether their incapacity was induced by the consumption of alcohol. Where alcohol is not involved or, the side effects of a medically prescribed drug are viewed as unforeseen, the courts have been less strict in their application of prior fault. In these cases the courts seem to take the view, that unless the risk is appreciated, the behaviour which precedes the automatism is less blameworthy, than in cases involving alcohol or dangerous drugs. This seems to be because the courts take the view that lack of mens rea or automatism brought about by a risk of which the defendant was unaware does not entail sufficient fault on the part of the defendant.⁴⁶ If the behaviour results in automatism the courts consider that it only attracts criminal responsibility where the risk of the self induced automatism is perceived by the defendant. This seems an acknowledgement on the part of the courts of the concept of individual autonomy.

The question of whether self induced automatism should be treated in the same manner as

44 [1973] 3 WLR 26, 35

45 MACKAY, R.D. 1995. p.153

46 Similarly evaluating whether a defence is actually invalid because of the self induced condition of the accused has been considered by the courts in relation to mens rea. In *R v Hardie* [1984] 3 All ER 848 the defendant, following the ingestion of a number of valium tablets, set fire to his girlfriend's flat, whilst she and her daughter were in the flat. His defence was that he did not have the requisite mens rea for the crime charged. The effect of the valium was felt by the court to have been unexpected

claims of no mens rea based on the consumption of alcohol was considered in *R v Bailey*.⁴⁷ In *Bailey* the court considered the policy relating to the imposition of fault in cases where alcohol was claimed to have impaired the ability of the defendant to form mens rea.⁴⁸ It also considered the approach adopted in *Quick* regarding self induced automatism resulting from a failure to take food after insulin. Bailey's claim to the defence related to his failure to take food after his prescribed dose of insulin. Griffiths L.J. said that there existed a 'material distinction' between someone 'who consumes alcohol or takes dangerous drugs and one who fails to take sufficient food after insulin to avert hypoglycaemia.'⁴⁹ This view seems clearly linked to different considerations from the protection of society from the anti-social and sometimes violent behaviour of the dangerous offender. It can be seen as an attempt to mitigate what might be seen as the harshness of the rigorous application of the *Majewski* doctrine.

There is, however, an apparent inconsistency between the approach taken in *Bailey* and that taken in *Quick*. In *Bailey*, Griffiths L.J. argues that only those who appreciate the risks 'of aggressive, unpredictable and uncontrollable conduct' resulting from a failure to take food after insulin should be held criminally liable. The criminal law requirement of recklessness will be met where the defendant 'deliberately runs the risk [of self induced automatism] but otherwise disregards it'.⁵⁰ The decision in *Quick* suggested that any self induced automatism might make it difficult for a defendant to plead automatism. But, following *Bailey*, this will not apply in the case of failure to take food after insulin if the risk of the automatistic episode, even where self induced, was not foreseen.

In *Bailey* the alleged criminal behaviour was the same type of behaviour as that discussed in *Quick* - a violent attack. Griffiths L.J. concludes from his consideration of *Quick* that the Court of Appeal may not 'have intended to lay down an absolute rule' regarding self induced

47 [1983] 2 All ER 503

48 The most relevant case law was considered by the court to be that contained in *R v Lipman* [1969] 3 All ER 410 and *DPP v Majewski* [1977] AC 443

49 [1983] 2 All ER 503, 507. Both quotations

50 [1983] 2 All ER 503, 507. Both quotations

incapacity. Griffiths L.J. notes that in *Quick* Lawton L.J. took the view that the jury should consider the fault of the defendant in relation to the reasons for his hypoglycaemic episode. Griffiths L.J. states '[t]hese questions suggest that even if hypoglycaemia was induced by some action or inaction on the part of the accused his defence will not necessarily fail.'⁵¹ The Court of Appeal took the view that in Bailey's case the recorder should have asked the jury to consider questions of the type raised in *Quick*.

However, as in *Quick*, the Court of Appeal did not order Bailey's retrial. The court concluded that the decisive factor for the jury in determining Bailey's guilt was that: '[t]here was abundant evidence that he had armed himself with an iron bar and gone to Harrison's house for the purpose of attacking him, because he wanted to teach him a lesson and because he was in the way.'⁵² It seems in *Bailey* the Court of Appeal found the most determinative factor for the jury was their interpretation of the agent's background reasons for acting as he did.⁵³ Additionally the medical evidence with relation to automatism showed: 'it was extremely unlikely that such an episode could follow some five minutes after taking sugar and water.'⁵⁴

It seems therefore that in evaluations of fault, where the ingestion of alcohol or dangerous drugs is not an issue, what is relevant is whether the defendant knew that by her actions she might cause herself to suffer automatism. Such evaluations will need detailed attention by the trial court. The defendant's views will be informative but the courts will face further and difficult decisions. The policy of social protection might suggest that society has a right to protect itself from people who fail to inform themselves of the basic requirements of taking medication. In *Bailey*, Griffiths L.J. was concerned with the risk to a potential defendant of becoming unconscious. He does not seem to have considered the difficult question of whether fault might attach to a defendant who put herself into a potentially stressful situation without ensuring that her blood sugar levels were appropriately balanced. Here, questions about what

51 [1983] 2 All ER 503, 507. Both quotations

52 [1983] 2 All ER 503, 508

53 A conclusion aided by the fact that the Court of Appeal in *Bailey* saw the defence as going to mens rea

54 [1983] 2 All ER 503, 508

the defendant knew or should have known, about her diabetes arguably should be relevant.⁵⁵

The problems related to the introduction of a notion of prior fault are illustrated by the Scots case of *Finegan v Heywood*.⁵⁶ The case concerned an incident of sleepwalking following the ingestion of alcohol. The court heard that on three occasions prior to the commission of the offence with which he was charged Finegan had suffered episodes of parasomnia following drinking alcohol. The High Court said that in view of this Finegan could not claim automatism, despite the fact that 'when the appellant took the car and drove it while drunk, his conscious mind was not controlling his actions.' There is no suggestion, in the case report, that Finegan's previous attacks of parasomnia had led to his driving vehicles whilst drunk. However, the court held that: 'the defence of automatism cannot in our view be established on mere proof that the appellant was in a transitory state of parasomnia which was the result of, and indeed induced by, deliberate and self induced intoxication.'⁵⁷ This may seem harsh in terms of what an individual defendant might have foreseen. However, it is similar to the approach suggested by the Law Commission in England.

Law Commission discussion of the distinctions to be drawn in cases where automatism results from mixed factors which include alcohol.

The question of what criminal liability should be attributed to the defendant whose automatism results from a mix of alcohol and an underlying condition has been considered by the Law Commission.⁵⁸ In *Quick*, Lawton L.J. seems to have viewed the question as being answered by understanding which factor most determined the defendant's behaviour - alcohol or lack of

55 For a discussion of the operation of the defence of automatism in relation to offences requiring recklessness see MACKAY, R.D. 1999. p.155-7

56 2000 SCR 461

57 2000 SCR 461, 464. Both quotations

58 In *David Peter Stripp* (1978) 69 Cr App R 318. The Court of Appeal considered a claim of automatism raised where the defendant claimed to have suffered concussion, when he had also been drinking. The Court concluded that there was insufficient evidence to found the defence of automatism

insulin.⁵⁹ The Law Commission has taken an apparently more strict view of the relevance of prior fault and has stated:

We recommend that, ...Recommendation 6 above (that automatism caused by voluntary intoxication should be no defence) should apply equally where the automatism is caused partly by voluntary intoxication and by some other factor.⁶⁰

The Law Commission's acceptance of this proposal is said to be based on the following argument made by Smith and Hogan:

Intoxication is no defence to a charge of a crime not requiring specific intent because this is thought necessary for the protection of the public. If the public needs protection against one whose condition is wholly brought about by intoxication, it also needs protection against one whose similar condition is partially so brought about. D should be found guilty of the offence.⁶¹

Again the policy of social protection seems to be affecting the balance of criminal responsibility. Culpability, once again is being seen as less relevant because there might be dangerous wrongdoing. The effect of the Law Commission's suggestion, in relation to the defence of automatism, does not extend simply to those who are dangerous but could potentially affect the culpability of those who are unfortunate. On this suggestion once enough alcohol is taken for the defendant to be deemed voluntarily intoxicated she loses the chance to claim automatism. Even if there is no relationship between her consumption of alcohol and her automatism.

Despite this it seems that the Law Commission still wished to permit a defence of automatism for the inadvertently intoxicated. An example of this might be a diabetic who has a minimal

59 'If he was in a confused mental condition was it due to a hypoglycaemic episode or too much alcohol. If the former, to what extent had he brought about his condition by not following his doctor's instructions about taking regular meals.' *R v Quick* [1973] 3 WLR 26, 35. For further discussion of this see MACKAY, R.D. 1995. p.157

60 *Legislating the Criminal Code: Intoxication and Criminal Liability*. (Law Com no 229, 1995) para 6.44

61 The Law Commission makes specific reference to this fact in para 6.43. The report states that the quotation is taken from SMITH, J.C. & HOGAN, B. 1988. *Criminal Law*. (6th edit.). London: Butterworths. p. 191

quantity to drink but, because of unexpected changes in her blood sugar levels, of which she could not be expected to be aware, enters a diabetic episode and as a result commits a crime. Alcohol, by the definition of intoxication in part VIII of the Law Commission's report clearly is an intoxicant. However, there is provision for the exclusion of the defendant who was not aware that he was taking something which 'was or might be an intoxicant' or alternatively 'he is intoxicated because he was unusually susceptible to the intoxicant, and he was not aware that he might be so susceptible (or, where he is so susceptible because of anything he did or omitted to do after taking it, if he was not aware at the time that he might become so susceptible)'.⁶² By a rather convoluted process the nature of the Law Commission's definition of involuntary intoxication provides some automatous defendants who imbibe intoxicants with access to the defence of automatism because their intoxication is deemed involuntary. It is not necessary to examine the problems of basic and specific intent crimes in this thesis but the reason that the Law Commission had to indulge in this convoluted reasoning seems to be its acceptance of the *Majewski* ruling.⁶³ The only comment that seems relevant here is that refinements of criminal responsibility at the dictat of social policy seem to obscure criminal responsibility rather than strengthen its underlying principles.

Social protection policy and determinations of criminal responsibility

In the application of policy considerations it has been argued that judges in the appellate courts when considering whether evidence of the defendant's involuntariness gives rise to the possibility of a defence of non-insane or insane automatism have given priority to the social policy issues regarding the disposal of those deemed to be dangerous. This in turn focusses the court's attention on the determinants of legal insanity rather than other determinants of criminal responsibility.

A particularly difficult area for the courts is where the automatism is said to be triggered by external mental pressures. In *R v Hennessy* the court stated:

⁶² Law Com no 229, 1995 - para 8.12. Both quotations

⁶³ For a discussion of the difficulty in distinguishing between alcohol and other triggers of automatism see MACKAY, R.D. 1995. p.158-9

In our judgement, stress, anxiety and depression can no doubt be the result of the operation of external factors, but they are not, it seems to us in themselves separately or together external factors of the kind capable in law of causing and contributing to a state of automatism.⁶⁴

Given the complexity of the claims of automatism that the acceptance of such a defence would have introduced it is hardly surprising that the court wished to exclude such factors from consideration. The argument before them was that Hennessy had suffered a hyperglycaemic episode caused by external factors - stress, anxiety and depression. If he had been successful in arguing his case at first instance, Hennessy would have gained an acquittal on the grounds of non-insane automatism.

The Court of Appeal supported the determination of the trial judge that Hennessy's plea was one of insane automatism. Thus Lord Lane, whilst not discussing the more usual definition of non-insane automatism directly, refers to the possibility of an acquittal for Hennessy as existing where a defendant 'did not know the nature and quality of his act because of something which did not amount to defect of reason from disease of the mind'.⁶⁵ In expressing the defence in this manner Lord Lane was creating an alternative definition of non-insane automatism stemming from the M'Naghten test of insanity. Normally the defence of automatism would not be expressed in this manner, indeed such a definition seems to widen the defence. An automaton is generally assumed by the courts to be either not conscious or partially conscious or to be in the throws of a muscular spasm or convulsion. Lord Lane's test includes within the realms of non-insane automatons anyone who does not fit within the M'Naghten Rules and does not know the nature and quality of their action.

In *R v Burgess*⁶⁶ Lord Lane had to consider an appeal against an insanity verdict where the defendant had claimed non-insane automatism. His claim was based upon the fact that he was sleepwalking when he committed the offence with which he was charged. Lord Lane discussed the tasks of a trial judge in respect of a plea of automatism:

64 *R v Hennessy* [1989] 1 WLR 287, 294

65 *R v Hennessy* [1989] 1 WLR 287, 291

66 [1991] 2 All ER 769

Where the defence of automatism is raised by a defendant two questions fall to be decided by the judge before the defence can be left to the jury. The first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, that is to say a case which falls within the M’Naghten Rules, or one of non-insane automatism.⁶⁷

Again the case raises the issue of dissociative states. The Crown’s expert argued that if Burgess was unconscious, ‘the most likely explanation was that he was in what is described as a hysterical dissociative state.’⁶⁸ The description given by Lord Lane to such a state is one in which ‘for psychological reasons, such as being overwhelmed by his emotions, the person’s brain works in a different way. He carries out acts of which he has no knowledge and for which he has no memory.’⁶⁹ The defence argued that Burgess was sleepwalking when he committed the offence with which he was charged. Lord Lane concluded that ‘violence in sleep is not normal.’⁷⁰ By this means he distinguished the case before him from the Canadian case of *R v Parks*, where sleep was considered a normal state.⁷¹

However, there is something problematic about the designation of a sleepwalker or diabetic as insane, neither sleepwalking nor diabetes are medically recognised mental illnesses. Furthermore, it is extremely doubtful whether the application of the M’Naghten Rules in this manner would withstand an appeal under the Human Rights Act 1998. It is suggested that a more appropriate manner to deal with the problems posed by cases such as *Hennessy* and *Burgess* would be to employ a more realistic test of when someone may be said to act involuntarily.

The actual medical argument advanced by the defence in the Court of Appeal in *Hennessy* was:

67 [1991] 2 All ER 769, 771

68 [1991] 2 All ER 769, 775

69 [1991] 2 All ER 769, 775-6

70 [1991] 2 All ER 769, 775

71 (1990) 56 CCC (3d) 449 Ont CA. This is despite the fact that the crimes with which *Parks* was charged were violent crimes

The appellant's depression and marital troubles were a sufficiently potent external factor in his condition to override, so to speak, the effect of the diabetic shortage of insulin upon him.⁷²

Presumably the argument was made to negate the arguments put forward by the judge at first instance that Hennessy's diabetes was a disease of the mind. The first notable problem with this argument is that it is expressed in terms of the internal/external distinction, which is medically unsupportable. As an explanation of the defendant's behaviour it seems unsustainable on the facts. However, it conveniently attempts to fit outside the M'Naghten Rules. The argument attempts to establish an external cause for Hennessy's diabetic episode. It suggests depression and marital (environmental) troubles are the operative cause of the appellant's criminal behaviour, rather than his failure to take insulin for a period of days. The real question for the court should be whether at the time of the potentially criminal act the defendant's diabetic condition could have caused him to lose his ability to act voluntarily. The strength of any test of voluntariness will be whether it allows a meaningful distinction between cases in which the capacity or ability to act voluntarily is lost and those in which it is not. It is suggested that the present test of automatism does not permit that distinction to be drawn and this is particularly apparent in cases where dissociative states are pleaded.

Dissociation and post traumatic stress disorder

As a result of the decision in *Burgess* and *Hennessy*, in England and Wales, a disease or disorder which is caused by stress, depression or anxiety may not form the basis of a non-insane automatism defence.⁷³ However the Canadian Supreme Court faced just such a plea in

72 [1989] 1 WLR 287, 293

73 However, such a defence has been accepted by trial judges in the lower courts in *R v T* but rejected by the jury. In *R v Janjirker* (unreported) automatism was argued before two separate juries. The claim was according to the newspaper reports linked to Post Traumatic Stress Disorder. Janjirker obtained an acquittal to charges of murder and manslaughter. The first jury was unable to reach a decision in respect of the manslaughter charge so that part of his case was reheard in front of a fresh jury. According to the *Daily Express*, the defendant 'may have been struck by "automatism" and unknowingly stabbed the teenager to death in the confrontation. The jury heard medical evidence that there was a strong connection between trauma and dissociation.' 26th September 2000 p.6. For a historic discussion of the case law surrounding dissociative states see MACKAY, R.D. 1980. Non-
(continued...)

R v Stone. The court also faced additional policy pressures because automatism in the guise argued by Stone raised the issues of a defendant being excused criminal responsibility for the murder of his wife. Bastarache J. said that his attention was directed to the risk of violent offenders obtaining a discharge by a case commentary in the *Canadian Bar Review*.⁷⁴ It is interesting to consider the points made in the case commentary in some depth because they point to the difficulty of deciding issues relating to voluntariness where the acts of the defendant are deemed to be dangerous and the issue of mental disorder falls to be considered.

The case commentary concerned *R v Parks*⁷⁵ in the Canadian Supreme Court. In *R v Burgess* Lane L.C.J. considered the earlier hearing of the case before the Ontario Court of Appeal. In *R v Parks* the Supreme Court was asked by the Crown to reconsider its designation of sleepwalking as non-insane automatism, in view of the arguments made by Lord Lane in *Burgess*. It did so and found the two cases distinguishable. The Supreme Court supported the decision of the Canadian Court of Appeal. In the case commentary Grant and Spitz are troubled by the dependence of the court 'on medical evidence and its explanation of the distinction between insane and non-insane automatism.'⁷⁶ In *Parks* the Supreme Court was of the opinion that:

It is clear from the evidence that there is almost no likelihood of the recurrence of violent somnambulism. ... It seems unlikely that the recognition of somnambulism as non-insane automatism will open the floodgates to a cascade of sleepwalking defence claims. First of all, the defence of somnambulism has been recognised albeit in *obiter* discussion in an unbroken line of cases stretching back at least a century, yet I am unaware of any current problem with specious defence claims of somnambulistic automatism.⁷⁷

73 (...continued)

Organic Automatism - Some Recent Developments. [1980] *Crim LR* 350-61

74 GRANT, I. & SPITZ, L. 1993. Accused killed While Sleepwalking - Acquittal or Not Guilty by Reason of Insanity. (1993) 72 *Canadian Bar Review* 224-37

75 [1992] 2 SCR 871

76 GRANT, I. & SPITZ, L. 1993. p. 229

77 [1992] 2 SCR 871, 907-8

The Supreme Court found the two Canadian tests: the 'distinction between internal and external causes' and 'the "continuing danger" test' difficult to apply to Parks. La Forest J. gave a reason for this. He said that the distinction between internal and external causes is blurred when applied to cases of sleepwalking.

As Martin J.A. suggested in *Rabey*, somnambulism is an example of a condition which is not well suited to analysis under the internal cause theory. The poor fit arises because certain factors can legitimately be characterised as either internal or external sources of automatistic behaviour. For example, the Crown in this case argues that the causes of the respondent's violent sleepwalking were entirely internal, a combination of genetic susceptibility and the ordinary stresses of everyday life (lack of sleep, excessive afternoon exercise, and a high stress level due to personal problems). These 'ordinary stresses' were ruled out as external factors by this Court in *Rabey* (although by a narrow majority). However, the factors that for a waking individual are mere ordinary stresses can be differently characterized for a person who is asleep, unable to counter with his conscious mind the onslaught of the admittedly ordinary strains of life. One could argue that the particular amalgam of stress, excessive exercise, sleep deprivation and sudden noises in the night that causes an incident of somnambulism is, for the sleeping person, analogous to the effect of a concussion upon a waking person, which is generally accepted as an external cause of non-insane automatism; ... In the end, the dichotomy between internal and external causes becomes blurred in this context, and is not helpful in resolving the inquiry.⁷⁸

The court was also critical of the continuing danger theory, but concluded that it might be looked on as a factor at the 'policy stage of the inquiry'⁷⁹ regarding the issue of insanity.

Grant and Spitz feel that some indication should have been given by the Supreme Court in *Parks* as to what states of dissociation were to be classified as insane.⁸⁰ Furthermore, the question of the violence displayed by Parks troubled Grant and Spitz. It also troubled Lamer C.J.C. who in part dissented from the majority of the Canadian Supreme Court in *Parks*.⁸¹ The Supreme Court based its decision on the fact there was evidence that it was extremely unlikely that Parks would commit a similar act. It was accepted that Parks' condition was not amenable

78 [1992] 2 SCR 871, 902-3

79 [1992] 2 SCR 871, 905

80 GRANT, I. & SPITZ, L. 1993. p.229-30

81 For Lamer C.J.C.'s discussion see [1992] 2 SCR 871, 892

to treatment. Additionally sleep was seen as a normal condition,⁸² therefore the internal/external distinction was not considered.

Rather than considering the nature of voluntariness, Grant and Spitz then engage in a detailed discussion of the internal/external distinction in establishing insanity. They argue that, as Parks' behaviour was abnormal for a sleepwalker, the court should have examined the reasonableness of the behaviour as a 'reaction to a normal phenomenon'.⁸³ If this sort of external/internal test were applied to claims of involuntariness it is hard to see how any defendant could be acquitted on the basis of non-insane automatism. The legal presumption is that voluntariness is the norm, by implication therefore, involuntariness is abnormal: may an abnormal reaction be said to be reasonable? Their suggestion runs into the problem of making the definition of insane automatism over inclusive. It would seem that, if as Grant and Spitz wish, violent offenders should be detained then the Canadian 'continuing danger' theory might offer more assistance than the internal/external distinction. The continuing danger theory is similar to the view expressed in the English courts: 'any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.'⁸⁴ However, in *Parks*, according to Grant and Spitz the continuing danger theory did not assist. This was because the court asked the wrong question and thus removed the effectiveness of the test. In the opinion of Grant and Spitz the likelihood of Parks having a recurrence of violent behaviour was not quantifiable and therefore the test was redundant: '[w]henever a legal determination is based on the prediction of something that is simply unpredictable, because its occurrence is so rare and poorly understood, one wonders what

82 'Sleepwalking is not a neurological, psychiatric or other illness but rather is a sleep disorder very common in children and also found in adults; and ... there is no medical treatment as such, apart from good health practices, especially as regard to sleep.' [1992] 2 SCR 871, 889 (Lamer C.J.C.) He does qualify this comment by saying that: 'This is not to say, however, that sleepwalking could never be a disease of the mind in another case on different evidence.'

83 GRANT, I. & SPITZ, L. 1993. p.235

84 *Bratty v Attorney General for Northern Ireland* [1963] AC 386, 412

function the test serves except in the most obvious cases.⁸⁵

In *Stone*, Bastarache J. accepted this argument:

The reasoning of the logic of Grant and Spitz is difficult to deny. Indeed it reveals that an assessment of the likelihood that the particular accused will again encounter the trigger alleged to have caused the current automatistic episode, or a similar one of at least equal severity, may assist a judge in assessing the continuing danger factor. The greater the anticipated frequency of the trigger in the accused's life, the greater the risk posed to the public and consequently, the more likely it is that the condition alleged by the accused is a disease of the mind.⁸⁶

It is hard to see why Bastarache J. found this logic convincing. The relevant factor, as argued by Grant and Spitz and adopted by Bastarache J., in the continuing danger theory is the trigger rather than the defendant's response to the trigger. They argue any determination regarding the continuing danger posed by a defendant should not be based on the likelihood of the future response of the defendant to the trigger which caused his automatism; but on the likelihood of the recurrence of the particular trigger which caused his automatism. This is because a defendant's likely future response to the trigger is troublesome to quantify. On this view insanity determinations of criminal responsibility or irresponsibility depend on factors which are only connected to the defendant by his reaction to them on one occasion, the time of the alleged criminal act. It is not quite clear why the use of this test makes assessing criminal responsibility easier. Indeed it would seem to provide an opportunity to increase the number of defendants found to be irresponsible on the grounds of mental disorder. It is argued that the most relevant factor in assessing whether a defendant will continue to be a danger to society lies in her future responses to the type of event that triggered the automatic episode on the occasion of her alleged criminal act. However, such an approach encounters further difficulties. In *Stone* the court had heard that his wife's behaviour triggered his violent attack. As she is dead this particular trigger is very unlikely to recur. Yet posing the question in terms of any behaviour which causes annoyance seems far too wide.

85 GRANT, I. & SPITZ, L. 1993. p.235

86 (1999) 134 CCC (3d) 353, 440 (Bastarache J.)

Loss of self control as opposed to loss of the capacity to control.

How to deal with 'dangerous offenders' is a really difficult issue for the courts.⁸⁷ In England and Wales the risk of recurrence of dangerous behaviour is an issue which determines one of the boundaries as to which defendants should be classified as not guilty by reason of insanity. Dangerous behaviour is often associated with violent behaviour, as it was in *Parks* and in *Stone*. At the conclusion of the Canadian case report there is a potentially disturbing assertion: Grant and Spitz remark that *Parks* is a problematic case because it concerned sleepwalking, 'and we have all experienced altered levels of consciousness in the process of sleep. Hence it may be easier for judges and juries to identify with losing control over one's actions in sleep altered states than in some forms of altered consciousness.'⁸⁸

There is a problem with conceiving of automatism as a loss of control over actions if that is to be interpreted simply as losing self control, rather than the loss of the ability or capacity to control movement. The emphasis in cases such as *Parks* and *Stone* should be upon investigating whether this capacity has been removed. There is a far greater risk of violent offenders escaping liability through the automatism defence if automatism is identified simply with this wider definition of losing control over one's actions. Such a definition of the involuntariness defence would broaden the ambit of the defence enormously. In England it would make the provocation defence less relevant because a successful defence of non-insane automatism secures an acquittal. It is no wonder if the defence is viewed in this manner that the writers of the article are concerned about the disposal of potential defendants. But the difficult question to answer is what is the appropriate test of involuntariness as expressed by the voluntary act requirement. If control is to be utilised as a measure of voluntariness then clearly its use as a test will have to exclude the wider definition of loss of self control. The use of the M'Naghten Rules in order to deal with the disposal of potentially dangerous defendants

87 For a discussion of the problem of assessing risk see: BROWN, M. & PRATT, J. (Eds.). 2000. *Dangerous Offenders*. London: Routledge; MONAHAN, J. & STEADMAN, H.J. (Eds.). 1994. *Violence and Mental Disorder: Developments in Risk Assessment*. University of Chicago Press; WALKER, N. (Ed.). 1996. *Dangerous People*. London: Blackstone

88 GRANT, I. & SPITZ, L. 1993. p.237

who might otherwise gain acquittal has also had the unfortunate effect of distorting both the test of voluntariness and insanity.

Dixon writing shortly after the decisions in *Kemp* and *Charlson* expressed concern that the recognition of an automatism defence in *Kemp* had created a situation where the guilt of the prisoner had been demoted in the arguments put before the court.

We are told by one report - 'It was accepted that at the time of the act the accused was suffering from arteriosclerosis and that he did not know what he was doing - that he did not know the nature or quality of his act.' And by another report - 'It was common ground that at the time of the attack the prisoner did not know the nature and quality of the act and that all the requirements of the M'Naghten Rules for establishing a defence of insanity were present, save that the question whether the prisoner was suffering from a disease of the mind was in issue.' This means that it was not part of the case for the Crown that the prisoner was guilty of the crime for which he was indicted, but that the prisoner did not agree in the Crown's reason for this conclusion and preferred another one. In other words, what, in the terminology once in use, appeared to be a criminal inquest was not in truth held to determine the guilt of the prisoner but was an inquiry into the question whether he should be held as a criminal lunatic. Is that to be a purpose of indicting or presenting a man?⁸⁹

This emphasis on the M'Naghten Rules is evidenced by the case of *R v Hennessy*.⁹⁰ As has been discussed the consideration of Hennessy's appeal took place against the background of the insanity defence. On the reasoning of the trial judge in *Hennessy*, once any defence of automatism is raised and the defendant's state of mind is put at issue - 'the preliminary question' which has to be decided 'is whether this was truly a case of automatism or whether it is a case of legal "insanity"'. This reasoning was approved by the Court of Appeal.⁹¹ Interestingly neither the Court of Appeal nor the court of first instance seems to have considered whether Hennessy's failure to take his medication from Monday until after the his arrest on the Thursday should be seen as creating a foreseeable risk that he would lapse into a

⁸⁹ DIXON, O. 1957. p.259

⁹⁰ [1989] 1 WLR 287

⁹¹ [1989] 1 WLR 287, 291

diabetic episode.⁹²

An unfortunate consequence of the Court of Appeal's reasoning with regard to the preliminary question to be considered when automatism is raised, is that once an appellant's state of mind is put in question by the defence the attention of the trial judge and jury becomes focussed on the M'Naghten Rules. This approach seems to concentrate on the consideration of social policy factors rather than criminal responsibility. This approach creates real difficulties. Firstly, it directs the attention of the court, particularly in the case of violent offenders from the issue of criminal culpability, to the M'Naghten Rules and the issue of the defendant's dangerousness. Secondly, it is problematic where the condition from which the defendant claims to be suffering is not a medically recognised mental disorder. Therefore any declaration by the court that the defendant is not guilty by reason of insanity may face challenge under the Human Rights Act 1998.

The problem with any argument that deals with the question of disposal prior to questions of criminal culpability is that it will tend to make definitions of insanity over inclusive and will create injustice. Real problems are caused when determinations of insanity are made unfairly. In America the courts have declared that it is against the interests of society to burden the hospital system with someone who is not medically insane. There is also a problem in terms of dissociative states and post traumatic stress disorder to ensure that the distinction is made between loss of self-control and loss of the capacity to act voluntarily. Someone who is violent as a result of extreme rage should not be excused criminal responsibility unless it can be shown that her action is involuntary.

How have the courts reached the position of finding it difficult to evaluate claims of automatism in common sense terms that address the issues of criminal responsibility and may be understood by both judges and juries? The answer to this seems to be that the courts are in this difficult position for two reasons. Firstly they have accepted an apparently mechanistic test of voluntariness which is based on a narrow determination of willed bodily movement and then

92 This can be contrasted with the approach taken by the Court of Appeal in *R v Quick* and *R v Bailey*

they have supplemented it so that it becomes comprehensible to judges and juries with a wider test of voluntariness. The first test 'an act which is done by the muscles' really doesn't assist in determining whether action is involuntary. As will be discussed in the conclusion to this thesis it is hard to think of any act which is done by the muscles alone except perhaps the knee jerk - and even that is the result of an artificial stimulus.

It seems therefore there is a need within the law for a definition of involuntariness which focusses the court's attention and medical practitioner's opinions when giving evidence on the requirements of criminal responsibility. What is needed is a viable definition which is readily comprehensible by juries and accords with modern scientific understanding of the concept of involuntariness. Adopting the present approach has had the disadvantage of unnecessarily widening the defence of insanity to encompass all types of epilepsy, conditions such as sleepwalking and certain types of diabetes.

Conclusion

Problems with the tests of involuntariness

In the course of this thesis a number of explanations of involuntariness have been considered. Two different types of involuntariness seem to emerge from the English case law. One, where loss of control over movement results in wrongful conduct and the second where the defendant is not fully conscious and is therefore not aware of what she is doing. Lord Denning attempted to describe both of these types of involuntariness in *Bratty*:

No act is punishable if it is done involuntarily: and an involuntary act in this context - some people nowadays prefer to speak of it as 'automatism' - means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.⁹³

There are problems with both of these definitions if they are considered against the background of current neuroscientific knowledge and the debate it engenders regarding states of consciousness.

Taking the first of Lord Denning's descriptions of involuntariness, 'an act done by the muscles without any control by the mind', this would seem to be a description which might encompass an epileptic who accidentally kicks out during a fit. However, if the neuroscientific description of an epileptic who kicks out is considered the problems exemplified by the mind/brain debate become immediately apparent. Lord Denning when describing what is caught by the test gives as an example 'a reflex action or a convulsion'.

However, the epileptic who in a convulsion kicks out, does so as a result of neural activity in the brain. The following description of an epileptic seizure clarifies this:

93 [1961] AC 386, 409. Note that in *R v Sullivan* [1983] 2 All ER 673 it was held that a defendant who made a violent attack on someone whilst in the 'third or post ictal stage of petit mal' should be classified as an insane automaton, p. 675 and p. 678

Epilepsy is a neurological condition. The brain has tens of millions of neurones, each connected to about 6,000 other neurones. When the brain is functioning normally, thousands of neurones fire (that is, give out a burst of electrical energy), transmitting information from cell to cell. Their activity is usually well organised, but sometimes — and this is what happens with epilepsy — the brain becomes too excitable and this super-excitability leads to areas going out of control, with many cells firing together.

These bursts of abnormal firing activity can last from seconds to minutes, and then the brain returns to its normal functioning state. While the discharge lasts, it causes a temporary change in our emotions, consciousness, intellect or behaviour, which is known as a seizure or ‘fit’.⁹⁴

It is clear from this description that kicking out during a seizure is the product of neural firings in the brain and in this sense is controlled by the brain, in that it could not happen were brain activity not taking place. The first test ‘an act done by the muscles without any control by the mind’ cannot include epileptic fits or convulsions where brain activity results in muscular movement unless mind is viewed as a separate entity to the brain. If mind is viewed as a separate entity to the brain the test is altered. It ceases to be a purely reductionist test of muscular movement and develops another dimension, which might be categorised as some form of internal observer in the brain. If Lord Denning’s description of involuntariness as ‘an act done by the muscles without any control by the mind’ is said to be a reductionist test, one where mind equates to brain, then the only movement described by the first test would be the knee jerk and similarly artificially triggered responses. Clearly, by the inclusion of convulsions within his list of examples, Lord Denning meant to encapsulate more than the knee jerk.

It is impossible to know whether Lord Denning was envisaging a mind separate from the other component parts of the body or simply some controlling ability arising within the neural networks of the brain which could lead to human action. Where the explanation would become scientifically contentious would be if Lord Denning meant to encapsulate the idea of what

94 The Observer Health. 29.10.2000. p.67 The article also makes the point that epileptic fits are not uncommon in the population.

‘Anyone might have a seizure, and in fact one in 20 people will have a major one during their life, but two thirds of those who have a single seizure will never have another one. Seizures can be the result of disease, injury, birth trauma, brain infection (such as meningitis or encephalitis), brain tumour, stroke, as well as drug or alcohol abuse and withdrawal. A tendency to seizures may develop for no obvious reason, though, or there may possibly be an inherited predisposition.’

Searle calls 'an irreducible self'.

Lord Denning's first test of involuntariness suggests that legally the mind is seen as having the ability under normal conditions to influence muscular movements. But the test is unnecessarily confusing. It implies that in order to know whether the act was done by the muscles it would be necessary to have some understanding of what the 'mind' was doing at the time the brain and the muscles were acting. There is a further problem with the test. It conflates two different conditions: reflexes and convulsions. Whilst convulsions involve brain activity, certain reflex responses do not. What they seem to have in common is a loss of control over bodily movement. It is not really necessary to include any description of what the mind is doing in an explanation of this type of involuntariness, but it is necessary to identify the types of movement for which legal liability is to be imposed and to consider what the conditions which exclude such an actor from criminal liability may be.

What is the distinction, neurologically speaking, between a reflex and a convulsion? Greenfield makes it clear that the reflex is one type of muscular contraction exemplified by the knee jerk. This type of movement is a stretch reflex and its neuroscientific explanation is:

the tap at the critical point on the knee in effect compresses a tendon by which the muscle in the lower leg is suspended, thereby exerting extra pressure on the muscles and stretching it. In order to compensate for this lengthening, the leg muscle contracts, so that the leg shoots forward.⁹⁵

There is a clear distinction between this type of muscular contraction and a convulsion caused by epilepsy. 'In epilepsy there is a miniature brain storm of certain groups of brain cells that can lead to convulsions.'⁹⁶ Yet in the legal test reflexes and convulsions appear in the same category.

A further problem arises from common usage of the term reflex which do not accord with

95 GREENFIELD, S. 1997 p.35

96 GREENFIELD, S. 1997 p.57

neuroscientific definitions. This confusion is exemplified in the Australian case of *Ryan*⁹⁷ where a claim of involuntariness was made by a defendant who had shot his victim in the course of a theft. Ryan claimed that his finger pulled the trigger as a reflex response to being startled. On the Greenfield explanation the squeezing of the trigger was not a reflex reaction, it may have been an instinctive response, but instinctive responses are capable of being controlled in a manner in which pure reflex reactions caused by the artificial stimulation of muscle groups are not. Involuntariness in the Greenfield sense of reflex occurs because there isn't any control of movement by the brain. Instinctive or habitual reactions require the brain to initiate, through neural activity, the co-ordinated response of the various muscle groups which are required to move the finger to pull the trigger. Applying Greenfield's description of how movement takes place reflex actions are comparable with other forms of involuntariness over which the actor has no control, such as being pushed against another person without the ability to restrain the movement or where unavoidable mechanical failure causes a car to crash.⁹⁸ Similarly the quality of involuntariness that attaches to convulsions seems to be that they are movements which no amount of mental effort on the part of the defendant could prevent. In this way they may be distinguished from instinctive or habitual behaviour. Spasms, convulsions and reflexes are the products of neuronal or physical stimulation which is beyond the individual's control.

Proposing a new test for this first type of involuntariness seems to be reasonably straightforward. It seems clear that the principle of autonomy, minimally applied, demands that anyone who totally lacks the ability to control their movements is not acting voluntarily. This type of behaviour would be typified by Greenfield's description of reflex actions, but would also encompass convulsions, and movements by people who clearly cannot prevent their movements doing damage to someone else.⁹⁹ By tying the control to movement rather than acts or action and avoiding the distinction between the mental and the physical many of the

⁹⁷ *Ryan v R* (1966-7) 121 CLR 205

⁹⁸ See SMITH, J.C. 1999. p.40 for a discussion of this type of case

⁹⁹ This type of case was envisaged by Lawton L.J. in *R v Quick* [1973] 3 WLR 26, 31 when he said: '[t]he law would be in a defective state if a patient accused of kicking a dental nurse by kicking her while regaining consciousness could only excuse himself by raising the defence of insanity.'

pitfalls pointed out by philosophers and neuroscientists may be avoided. Fischer and Ravizza suggest in their description of responsibility and control that such an actor has no guidance control.¹⁰⁰ Ryan does not seem to fit within this category.

Lord Denning's second test of involuntariness concerns the defendant's mental state at the time of the wrongful act: 'an act done by one who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking'.¹⁰¹ Viscount Kilmuir's opinion in *Bratty* reveals a similar train of thought to Lord Denning's in his acceptance of the definition of automatism given by the Court of Appeal:

The state of a person who, though capable of action, is not conscious of what he is doing ... it means unconscious involuntary action, and it is a defence because the mind does not go with what is being done.¹⁰²

Neurologically speaking, in such cases, the brain has to go with what is being done, otherwise movement would not occur. In fact it has to 'go' before any movement can occur. What seems to be being argued is that the internal observer in the brain is not aware of what is being done. The inclusion of an undefined notion of consciousness or unconsciousness within the identification of involuntariness confuses the issue. Descriptions of this type stipulate that in order for action to be voluntary a defendant should be conscious of what 'he is doing'. However, people who carry out routine tasks may well not be consciously aware of what they are doing. Conversely, on some explanations of consciousness, somnambulists may be viewed as conscious.¹⁰³ The more relevant question should be has the defendant the capacity to monitor what she is doing? If she has, she retains the capacity to alter her behaviour in order

100 'an agent is morally responsible for an action in so far as he has guidance control of it, where guidance control consists in the action's issuing from the agent's own, moderately reasons-responsive mechanism.'

FISCHER, J.M. & RAVIZZA, M. 1998. p.231

101 [1961] AC 386, 409

102 [1963] AC 386, 401

103 For a full discussion of somnambulism see SHAPIRO, C. & McCALL SMITH, A. (Eds.). 1997. *Forensic Aspects of Sleep*. Chichester: John Wiley & Sons. For a description of what happens during sleep see HOBSON, J.A. 1989. *Sleep*. New York: Scientific American Library

to prevent the wrongful act occurring.

When a person instinctively catches a projectile that is thrown at her, her response - catching the ball - may be initiated by the neurons in the brain before the event enters her consciousness. Whilst she may not be conscious of what she is doing until the moment before she catches the ball this does not mean that she is unconscious, or that she has lost the capacity to act or refrain from acting. Consider again the case of Ryan, who did not fit within the first category of involuntary defendant. Even if Ryan pulled the trigger as an instinctive response to his situation, there is evidence that in taking a loaded gun and having his finger on the trigger the pulling of the trigger, if only in extremis, must have been part of his overall plan. What happened, if his version of events is to be believed, is that the plan went wrong. By taking a loaded gun with him to the scene of the crime Ryan seems to have decided that he might need to fire the gun should sufficient reasons exist for his doing so.¹⁰⁴ The Libet explanation of action suggests that acts occur following readiness potential. Libet's experiments suggest that, at a time some milliseconds before action, inhibition of that action can occur. Ryan, for whatever reason, did not abort the movement of his finger on the trigger. He may well not have been consciously aware of his capacity to restrain his movement, but that does not mean that his capacity to prevent that movement was impaired. He may have panicked and fired the gun but that does not mean that he did not retain the capacity to act otherwise. The courts in England and Wales have refuted claims based on lack of consciousness of surroundings in the driving cases.¹⁰⁵ However, taken at face value the present test tends to admit those who suffer from impaired consciousness without asking the further pertinent question - that is whether they lacked the capacity to act voluntarily.

Additionally the courts have responded to the problem posed by defendants who commit one

104 Or alternatively he may have been careless with regard to whether the gun was loaded or not. But even if this is the case there was a point during his preparation for the robbery when he decided to take a gun. If he didn't check the gun before taking it, it must be acknowledged that there was a possibility that it might be loaded. These issues, however, are more relevant to the question of mens rea than the question of voluntariness

105 AG's Reference (No 2 of 1992) [1993] 4 All ER 683

off dangerous and wrongful acts by invoking social policy to control the perceived risk of a flood of dangerous defendants who might obtain acquittal. This has resulted in the identification of insane automatism with certain conditions where previous defendants have exhibited dangerous behaviour. The courts have introduced the tests of 'disease of the mind' and have utilised the internal/external cause distinction in an attempt to prevent the possibility of acquittal. The result is injustice to those who might be felt by society at large to most deserve an acquittal. The *Daily Mail* was most sympathetic to the unfortunate Dutch woman who cooked her baby. But in England, had she successfully pleaded the defence of automatism, she would have been found insane. In certain states of America the response of the court might well have been a prison sentence. Recently in New Kent, Virginia a 20 year old woman who suffered from epilepsy was jailed for five years for killing her five month old son, 'by putting him in a microwave and turning it on.' She said of her alleged offence 'I can't remember doing this, if I did'. The newspaper report states:

Otte was charged with involuntary manslaughter and said that, whilst she did not admit guilt, she accepted that there was enough evidence to convict. Judge John Alderman said: 'It is possible that this child's death was a tragic accident.'¹⁰⁶

Is it appropriate that a prison sentence may be imposed on such a defendant if in reality the evidence, according to the judge, points to the possibility that the death of her child was - 'a tragic accident'?

A further difficulty exists in this type of case in England and Wales when in order to protect the public the court determines that a defendant only has the defence of insane automatism. The definition given to disease of the mind within the M'Naghten rules is extremely wide and encompasses states of sleepwalking, hyperglycaemic diabetic episodes and all types of epileptic episode. The case law of the European Court of Human Rights makes it clear that deprivations of liberty in such cases should only occur in certain limited circumstances:

106 All quotations from Ellison M. 2000. Woman put her baby son in oven, *Guardian* 15.12.2000, p.16

In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority—that is, a true mental disorder—calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.¹⁰⁷

As previously discussed this is likely to create problems for the application of the M'Naghten rules in cases of automatism.¹⁰⁸

Consciousness and involuntary action

How does case law suggest that consciousness should be viewed? Lord Simon stated '[t]he first concept that the law accepts generally as a datum is that of the conscious mind.'¹⁰⁹ He went on to say that 'punishment as a deterrent' was aimed at 'halting action on the verge of consciousness' as well as 'instituting a utilitarian debate in the conscious and reasoning mind whereby the pleasures and pains consequent upon prohibited action are weighed against each other.' It seems clear from these quotations that Lord Simon perceived what Searle would describe as an irreducible self, not simply a brain, something which was capable of applying conscious reasoning processes to decisions to act. Lord Simon rejects the determinist argument with regard to free will and defines free will as - 'a potentiality in the conscious mind to direct conscious action - specifically the power of choice in regard to action.'¹¹⁰

Where the difficulty with this statement seems to lie in relation to voluntariness is in applying it to apparently purposive actions committed in states of partial consciousness. How is involuntariness to be defined in this sense? Lord Simon's opinion was that 'there may be

107 *Winterwerp v The Netherlands* (1979) 2 EHRR 387 para 39. The European Court of Human Rights recently affirmed all three parts of the *Winterwerp* test in the case of *Varbanov v Bulgaria* judgment given 5th October 2000 Application No 31365/96

108 See chapter 2 p.80-81

109 *DPP for Northern Ireland v Lynch* [1975] AC 653, 688. All quotations

110 [1975] AC 653, 689

physical movements which are not the subject of choice - cases of so called “automatism””.¹¹¹ Lord Simon’s explanation rests on the power of choice, though he makes it clear that this choice is not unfettered.¹¹² According to Stephen what makes choice relevant to voluntariness is the ‘determination to take a particular course’ which becomes a ‘volition’ and then leads to the ‘direction of conduct towards the object chosen’. Stephen calls this an ‘intention’.¹¹³ After this choice, ‘there takes place a series of bodily motions or trains of thought and feeling fitted to the execution of the intention.’¹¹⁴

This type of explanation entails free action or the ownership of behaviour implying a mind or a conception of an irreducible self, which is responsible for wrongful choices. Lord Simon’s and Stephen’s explanations perhaps have their basis in the Aristotelian notion that what makes action involuntary as distinct from action under duress is the ability to choose. Hornsby suggests that whether someone is responsible for their actions lies within an assessment of whether the action is ‘ours’. The answer to this question she suggests lies in the actor’s ‘thoughts and wants’, the ‘causal ancestry’ of movement. According to Fletcher the willed bodily movement model being mechanistic cannot define responsibility. Searle suggests that Humean or scientific causation will not explain voluntariness or involuntariness. Though it may be argued that scientific causation will assist in the identification of some of the components which create such states. According to Searle when a person makes something happen the movements of his body are caused by a psychological item which he calls ‘intention in action’. The ability to act voluntarily is the product of an irreducible self according to Searle. He argues that in all probability the sense of free action lies within unified conscious fields created by the brain’s neural networks. It is in the neural activity that stimulates these unified fields of consciousness that the psychological antecedents of action begin.

If one accepts the argument that psychological items are the causal antecedents of movement,

111 [1975] AC 653, 689

112 [1975] AC 653, 690

113 STEPHEN, J.F. 1883. p.100

114 STEPHEN, J.F. 1883. p.101

a problem arises when one attempts to fit this explanation within the traditional framework of jurisprudential arguments regarding criminal responsibility.¹¹⁵ Firstly such an explanation does not fit the willed bodily movement model. There is also a further problem if the philosophical description of intentionality is considered. This brings the discussion back to the argument made by Hornsby that ‘any ascription of legal responsibility may not most happily be understood in the context of “an action” in which intentionality has entered.’¹¹⁶ This is because of the number of specialist definitions within the law relating to actus reus and mens rea, not the least of which is the distinction which is made between differing types of intention.

Additionally there is according to Fitzgerald a problem with the common law requirement that there be an act before criminal liability is imposed. This he claims has led to the situation where the common law requires ‘that certain conduct, involuntary conduct does not involve the actor in any responsibility because it is said there is in reality no act on his part.’¹¹⁷ Overlaying these difficulties is the lack of philosophical agreement as to what action or intention may be and as to what type of action explanations are to be preferred. However, there seems to be agreement as to the types of state which are relevant to whether action is voluntary. At its most straightforward a total absence of control of movement constitutes involuntariness. At its most complex the loss of the capacity for conscious awareness and the concomitant loss of the ability to choose¹¹⁸ how to behave seems to underlie the second legal test of involuntariness.

Loss of the conscious capacity to monitor behaviour also seems to underlie the distinction between loss of self control and automatism. Loss of self control seems to be explained by ‘giving way’ to an impulse to do something which the individual would not normally consider

115 For a discussion of these arguments see MACKIE, J.L. 1977. *The Grounds of Responsibility*. in HACKER, P.S. & RAZ, J. (Eds.). *Law Morality and Society - Essays in Honour of HLA Hart*. Oxford: Clarendon. p.175-88

116 HORNSBY, J. 1993b. p.71

117 FITZGERALD, P.J. 1961. p.1

118 In the more limited legal sense of choice - actions taken under duress are still voluntary, because the ability to act otherwise remains

appropriate behaviour. In cases of automatism what seems to be being asserted is that the individual was not sufficiently conscious to be aware that the impulse existed and there was therefore no possibility of preventing the wrongful behaviour occurring. More complex automatism claims are based upon the perception that co-ordinated movements may occur without the person making the movements having any sense of ownership of her acts. The problem is how to encapsulate this idea into a sufficiently workable test.

Scientific descriptions of behaviour do not seem able to explain adequately how consciousness is relevant to this type of involuntariness. This is because scientists at present can only speculate as to how the neuronal activity in the brain may stimulate movement and the accompanying sense of control over behaviour. Judgements as to responsibility are taken against the background of a particular person's reasons or lack of reasons for acting. It seems that what should be relevant to the attribution of legal responsibility, is whether the medical explanation suggests that a particular defendant lacked sufficient consciousness to have the capacity to alter her behaviour. Thus the question to be answered by medical evidence is fairly straightforward. It is whether the evidence supports the assertion that the defendant is making, that is that her criminal act resulted from involuntariness, and whether this explanation, together with any other evidence, offers a plausible explanation of the defendant's behaviour. The wider issue of whether she could be described as conscious or not on this view may either support or detract from the argument that her capacity to control action was extinguished but it will not answer the specific question, though it may point to what the answer might be.

Scientific evidence should be specifically aimed at providing information aimed at informing the jury's discussion of the most pertinent question. How should this test be expressed? It is suggested that any new test should include consciousness as a measure of involuntariness but should be more focussed. Consciousness clearly is highly relevant as it should be necessary for a defendant to have the capacity to be consciously aware that she is behaving in a certain way in order for criminal liability to be imposed. But full consciousness is not required for liability to be imposed, in the case of those engaged in habitual or instinctive action there is still the capacity for conscious appreciation of the fact of action. So what is required is not full

consciousness but sufficient consciousness to monitor behaviour. Monitor in the sense of the capacity to utilise the perceptual inputs that the body receives and initiate appropriate behaviour in response to those inputs. Legally automatism relates to an inability to control movement. The law has taken the approach that 'his mind did not go with what was being done'.¹¹⁹ Expressing this concept in words a jury would understand is problematic.

Three alternative forms of expressing the 'doing' part of the 'what he is doing test' suggest themselves. These are 'behaviour', 'acts' and 'movement'. The word 'act' presents two problems. Firstly there is the dispute as to the philosophical meaning of action and the attempts to fit philosophical meanings within the present framework of criminal liability. Linked to this is the second problem, it seems illogical to refer to omissions as acts. Behaviour has a variety of meanings of which the most relevant are:

Manner of bearing oneself; demeanour, manners, observable actions; treatment shown *to* or *towards* another or others. ... 2. An instance or way of behaving: an observable pattern of actions, a response to a stimulus.

The meaning of movement is more limited: '[t]he action or process of moving; change of place, position or posture, passage from one place to another, activity.'¹²⁰ It is suggested that it is movement which seems best to encapsulate the legal test of 'what he is doing'.

Finally, taking account of the descriptions of action considered in chapter 4 what the test needs to encapsulate is not whether an action is willed but rather whether the actor had a sufficient degree of consciousness to have the capacity to monitor the translation of the psychological antecedents of action into movement. It is suggested that the test should be split into two parts in order to avoid conflation of the two different concepts which underlie the

119 *Bratty v Attorney General for Northern Ireland* [1963] 386, 401

120 Definitions taken from *The New Shorter Oxford English Dictionary* (3rd edit.). 1993. vol. 1. Oxford: Clarendon. Emphasis in original

present definitions of involuntariness:¹²¹

Involuntariness would exist:-

**when an actor lacked any ability to control her movements, or
when an actor lacked a sufficient degree of consciousness to have the
capacity to monitor movement**

When formulating the test consideration was given to whether the second test should be limited to a particular defendant's movements. However, this poses problems with the second test in terms of liability for omissions. This does not affect the first test because anyone who cannot control her movements cannot control her omissions. However, with respect to the second test it may not just be the defendant's own movements which are relevant. For example, someone who because of a malfunction cannot perceive the movements of others may omit to act - yet the omission would be involuntary.

Applying the test in the case of the epileptic mother who cooked her baby the relevant question becomes: did she have a sufficient degree of consciousness to have the capacity to monitor her movements? Presumably her argument that she lacked a sufficient degree of consciousness would be based on her epilepsy. Medical evidence would therefore be relevant

121 The Draft Criminal Code Bill 1989(Law Com. No. 177), clause 33 similarly suggests that the definition of the defence should be split into two parts:

'(1) a person is not guilty of an offence if -

(a) he acts in a state of automatism, that is, his act -

(i) is a reflex, spasm, or convulsion; or

(ii) occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of effective control of the act; and

(b) the act or condition is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication.'

The Draft Bill makes it clear that epileptics and hyperglycaemics would not have a non-insane automatism defence. Sleepwalkers and those who were hypoglycaemic might have an automatism defence. With the exception of sleepwalking the Draft Bill retains the existing common law distinctions between non-insane and insane automatism which have been criticised in this thesis as arbitrary and unfair.

The second part of the test relies on the conception of control in relation to impairments to consciousness. The problems of this approach have already been discussed

with regard to her own medical condition and the potential impact of epilepsy, in particular whether it could so affect consciousness so that she could lose her capacity to monitor her movements to the extent that she no longer recognised the distinction between her baby and the bottle. If the jury was satisfied that she lacked a sufficient degree of consciousness to have the capacity to monitor her movement then legally she would be acting involuntarily and therefore would not be criminally responsible for her baby's death. It is argued that the adoption of this more focussed test of involuntariness would permit accurate evaluations of a defendant's behaviour.

While insanity is not the subject area of this thesis, the interface between the insanity and the automatism defence is clearly relevant to the discussion of involuntary action. There remains the problem of how claims of involuntariness relate to the defence of insanity. It is accepted that the concerns of social policy are likely to influence where the borderline is drawn. Searle has argued strongly that any map based on two separate territories - the mental and the physical - will obscure investigations into what action might be and the relationship between mind and body. The same may be argued in relation to the internal/external distinction. It may be argued that the internal/external test is not a test of automatism but of insanity, and that it has arisen in automatism cases as a means of distinguishing between defendants who pose a danger to society because of a recurrent underlying medical condition and those who do not. But even so it still seems to serve to obscure more than it serves to enlighten. It is difficult to explain the arbitrary distinction between hypoglycaemia and hyperglycaemia. Both types of diabetic episode may be brought about by the defendant's own conduct. Both may result from her medical condition; why one is viewed as insane and the other not is difficult to understand. This distinction is increasingly unsupportable scientifically or philosophically or in terms of common sense explanations of behaviour and it would be sensible for the courts to abandon it as a means of evaluating insanity. Where the court finds that there is no criminal responsibility; and the evidence shows no medically recognised mental disorder and no serious risk of reoffending by a defendant the question has to be asked why deem her criminally insane even when she has committed a dangerous act? Such a defendant has been proved not to be criminally responsible, and there is no evidence that she is a future risk to society. To detain

such a person is to cross the boundary set by the principle of personal autonomy. Furthermore, it is clear that the M’Naghten Rules would seem to contravene the European Convention on Human Rights and Fundamental Freedoms. How the courts will balance the competing needs of social protection and individual human rights is not clear. It is however clear that the present definition given to disease of the mind in the M’Naghten Rules is over inclusive.

The application of the Convention in English law following the Human Rights Act 1998 is bound to have a profound effect upon the legal definition of insanity. It casts doubt on whether it will be possible to deprive people of their liberty on the grounds of illnesses which do not satisfy the *Winterwerp* test. This is likely to have most effect in the area of insane automatism where the legal definition of disease of the mind has had the effect of subsuming certain claims of automatism within the insanity defence. The utilisation of the proposed test together with the application of the *Winterwerp* test will focus the courts’ attention on issues of culpability and personal autonomy. It is suggested that this is a better focus for the courts’ discussion in relation to the fundamental claim that action was involuntary rather than issues of whether a defendant has lost her self-control.

The proposed test has many advantages. It should be more easily understood by juries and expert witnesses than a test which suggests that muscles act without instruction from the mind, or that those who are unconscious should be excused when they don’t know what they are doing. It sets a framework within which medical explanations of behaviour may be evaluated. It does not suggest that behaviour will be excused when it is instinctive or habitual, if the actor is sufficiently conscious then his capacity to monitor movements exists and criminal liability should be imposed. The word act has been avoided. The controversy over what description of action is relevant to moral responsibility will continue to be debated. However, nothing is lost in terms of instructing a jury by focussing their attention on the ability to control movement or the capacity to monitor movement. The use of an alternative word to action also removes the problem of defining omissions as acts. Thus criminal liability for omissions might be imposed when the defendant had the ability to control her movements or a sufficient degree of consciousness existed for her to monitor movement. The test also

makes the distinction between extreme states of rage or shock which cause dissociation and provocation in a manner which should focus a jury's attention on what is relevant to involuntariness. The test also works in relation to other types of involuntary behaviour. The person whose hand is used to inflict harm or the driver whose car suffers brake failure, may fall within the description of someone who has lost any ability to control movement. It provides a framework from within which medical or scientific explanations of behaviour may be evaluated without any distortion of the medical evidence to fit a legal definition which does not accept advances in scientific knowledge. It is clearly expressed and should be readily understood by all those who will be asked to apply it either in giving evidence or reaching judgment.

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